





# San Francisco Law Library

No. 77677

Presented by

---

## EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.











No. 4008

1347 IN THE 1347  
**United States Circuit Court**  
**of Appeals**  
**For the Ninth Circuit**

ALLIANCE INSURANCE COMPANY,  
BRITISH & FEDERAL FIRE UNDER-  
WRITERS OF THE NORWICH UNION  
FIRE INSURANCE SOCIETY, COM-  
MERCIAL UNION ASSURANCE COM-  
PANY, LIMITED, AND STAR  
INSURANCE COMPANY OF AMERICA,  
Corporations,

*Plaintiffs in Error,*

vs.

THEODORE ENDERS,

*Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

GEORGE F. SHELTON,  
FINIS BENTLEY,  
HOWARD TOOLE,  
BRICE TOOLE,

*Counsel for Plaintiffs in Error.*

FILED

SEP 21 1923

F. D. MONKTON,  
CLERK







No. 4008.....

---

IN THE  
**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

---

ALLIANCE INSURANCE COMPANY,  
BRITISH & FEDERAL FIRE UNDER-  
WRITERS OF THE NORWICH UNION  
FIRE INSURANCE SOCIETY, COM-  
MERCIAL UNION ASSURANCE COM-  
PANY, LIMITED, AND STAR  
INSURANCE COMPANY OF AMERICA,  
Corporations,

*Plaintiffs in Error,*

vs.

THEODORE ENDERS,

*Defendant in Error.*

---

BRIEF FOR PLAINTIFFS IN ERROR.

---

STATEMENT OF THE CASE

These cases are here on writs of error to the United States District Court for the District of Idaho, sued out by the four corporations above named, defendants

below, plaintiffs in error here, to reverse four judgments rendered against them severally in favor of Theodore Enders, plaintiff below, defendant in error here, because of certain errors set forth in the Assignments of Error.

Four suits were brought by Theodore Enders, one against the Alliance Insurance company; one against British & Federal Fire Underwriters of the Norwich Union Fire Insurance Society; one against the Commercial Union Assurance Company, Limited, and one against the Star Insurance Company of America, on policies of insurance issued by said defendant corporations to recover for loss and damage sustained by the plaintiff by reason of a fire alleged to have occurred on the 7th day of June, 1921, which is alleged to have destroyed a certain hotel and apartment house, together with the furniture and fixtures therein contained and which it is alleged were covered by the policies of insurance issued by the defendant companies to Theodore Enders, the plaintiff.

The four policies of insurance were practically identical in form and substance, each policy was for the sum of four thousand dollars (\$4000.00). Theodore Enders was named as the insured in each. Each bore date, April 27, 1921. The premium upon each was two hundred and twenty-six dollars (\$226.00). The property described as the subject of insurance in each policy is as follows:



No. 1. \$3000.00.

On the three-story shingle roof frame building, and its additions, (if any), of like construction communicating and in connection therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the East Side of Dillon Street, between Hooper and Railroad streets, in Soda Springs, Idaho.

No. 2. \$1000.00.

On hotel or apartment or boarding or lodging house, furniture, fixtures and furnishing materials, useful and ornamental; musical instruments, mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery; supplies, provisions and fuel; laundry and machinery and apparatus; electrical apparatus, appliances and devices; tools, implements and utensils used in business and signs; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction and in contact therewith.

A copy of the policy issued by each Company is attached to the complaint of the plaintiff in each case, and made a part thereof. Each Company filed its answer in the suit against it, taking issue upon the allegations of the complaint and setting forth specific affirmative defenses to which reference will be made hereafter.

When the cases were called for trial, the court ordered and it was agreed by counsel that the four cases be consolidated for the purposes of trial and the said cases were heard and tried pursuant to said order as one case.

A separate verdict was rendered by the jury in each case, and a separate judgment made and entered on said verdict.

To reverse said judgment each defendant sued out the separate writ of error herein.

In the statement of the issues presented by the pleadings, the complaint in each case being the same, and the answer of the defendant in each case being the same, we shall refer to the plaintiff, Theodore Enders, as the plaintiff, and the defendant in each case, as the Company.

The plaintiff alleges in his complaint:

“That the plaintiff at all times herein mentioned as the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North Half (N½) of Lot Four



(4) in Block Thirty-Eight (38) in the village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon, had an insurable interest in a three-story frame building, and the contents thereof, erected and situate on the premises last described, and known as the Idanha Hotel at the time of its insurance and destruction by fire as hereinafter mentioned.

“That on the 27th day of April, 1921, at Soda Springs, Idaho, in consideration of the payment by the plaintiff to the defendant, of the premium of \$226.00 the defendant, by its agent, duly authorized thereto, executed and delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not exceeding \$4000.00 upon one three-story shingle roof, frame building occupied for hotel and apartment house purposes, situate on the East side of Dillon street, between Hooper and Railroad streets, in Soda Springs, Idaho, and the furniture, fixtures and furnishings material, silverware, crockery, glassware, supplies, provisions and fuel and all apparatus or implements contained in said building, said building being insured in the amount of \$3000.00 and the furniture, fixture, etc., in the amount of \$1000.00, a copy of which policy is annexed hereto marked Exhibit ‘A,’ and by this reference incorporated herein and made a part of this complaint and this paragraph the same as if herein set out in full.”

He also alleges in paragraph IV of said complaint as follows:

“That no written application was made by plaintiff herein to the defendant or its agents for the issuance of said insurance policy, but that the plaintiff at the time of the oral negotiations between the plaintiff and defendant’s agent for the insuring of the property heretofore described and before the issuance by defendant of its insurance policy, Exhibit ‘A’, the plaintiff specifically advised and informed the agent of said defendant, one Wm. H. Jackson, Jr., he being the defendant’s agent who issued and delivered said policy, Exhibit ‘A,’ to plaintiff, that the Natural Mineral Water Company had been the original owners of said property and had sold the same to plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it payable to the National Mineral Water Company as their interest might appear, and that said agent advised this plaintiff that he understood about the Natural Mineral Water Company and it was included in the Fred J. Kiesel Estate, and that he would annex the clause in proper manner; that in issuing said policy, as is shown therein, the said agent by mistake, or inadvertance, the exact reason being unknown to plaintiff, made the loss, if any, on the building, therein insured, payable to the Fred J. Kiesel estate, mortgagee or, as its interest



might appear, 'that the Fred J. Kiesel estate was not the mortgagee or trustee of said property and did not at that time, nor has at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy, are due and payable to plaintiff, who is the only party interested in the same.' "

Plaintiff further alleges :

"That immediately after destruction of said insured property by fire and on the same day, the plaintiff notified Wm. H. Jackson, Jr., the defendant's agent, of Pocatello, Idaho, of said total loss by fire; that thereafter and within forty-eight hours after June 7th, 1921, said Wm. H. Jackson, Jr., notified the defendant herein by telegram and by written notice of the loss and destruction of the insured property by fire; that in response to said notification given to defendant's agent by this plaintiff, the defendant sent its agents and adjusters to the scene and place of said fire for the purpose of adjusting said loss; that said adjusters, agents and representatives of the defendant came to Soda Springs, Idaho, and investigated said loss and inspected the premises where the insured property had stood; that by the sending of adjusters, agents and representatives to inspect and adjust said loss, the loss being a total loss, the defendants waived any further notice and proof of loss by the plaintiff and waived written proof of loss within sixty days as required by Exhibit 'A,' annexed hereto."

Plaintiff further alleges:

“That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged.”

In the policy of insurance, Exhibit “A” attached to plaintiff’s complaint is the following loss payable clause:

“Loss, if any, on building only, subject, however, to all terms and conditions of this policy, payable to Fred J. Kiesel Estate, mortgagee and assured.”

The policy also contains mortgage clause with full contribution wherein it is specified as follows:

“Loss or damage, if any under this policy, on buildings only, shall be payable to Fred J. Kiesel Estate, mortgagee (or Trustee) as interest may appear.”

The policy also contained the following provision:

“THIS POLICY IS MADE AND ACCEPTED subject to the foregoing stipulations and conditions, and to the following stipulations and conditions, printed on back hereof, which are hereby specifically referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added



hereto; and as to such conditions, provisions, no officer, agent, or representative shall have such power or be deemed or held to have waived such conditions, provisions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The policy also contained the following provision:

"If fire occurs the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss, thereon; all incumbrances thereon; all other insurance whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein

described and the several parts thereof were occupied at the time of the fire.”

To the complaint defendant filed its answer taking issue upon all of the material allegations of the complaint and set forth certain affirmative defenses as follows:

In the first affirmative defense, defendant relying upon the provisions of the policy above quoted as to the authority of any agent to waive any of the provisions of the policy, except in writing, attached to the policy thereupon further quotes the provisions of the policy as follows:

“This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss.”

and specifically sets forth under this quoted provision that plaintiff Enders was not at the time of the issuance of the policy nor on the alleged date of the fire, to wit, the 7th day of June, 1921, the owner of said property nor did he have any insurable interest therein, but that the said real property stood in the name of, and was owned by the Natural Mineral Water Company.

Defendant Company further alleges that plaintiff Enders procured to be attached to said policy of insurance the mortgage clause set forth in said policy of insurance in favor of the Fred J. Kiesel Estate, mortgagee, as its interests might appear, and has inserted in said policy the provisions that the loss, if any, on building only, subject to all the terms and conditions of the policy, was payable to the assured and Fred J. Kiesel Estate, Mortgagee.

That later in September, 1921, and after the said fire, the plaintiff set forth and specified in the statement made by him to the defendant that said Kiesel estate has and holds an interest in said property as security in the sum of fifty-four hundred dollars (\$5400.00) and that there were no further incumbrances thereon.

That in said complaint, paragraph IV, above quoted, plaintiff had stated that Fred J. Kiesel Estate, was not the mortgagee or trustee of said property and did not at that time, nor at any time since, have any interest whatever in said property, and that there was a material misrepresentation in writing as to material facts and circumstances concerning said insurance, and the subject thereof, and of the interest of the assured in the property, and that by reason thereof the said policy was void and the plaintiff had no right of recovery thereon.

For a second affirmative defense the defendant company quotes the provision of the policy relative to notice in writing and proof of loss as above set forth and quotes the following provision.



“No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.”

Defendant Company then sets forth that the plaintiff did not immediately after the fire on the 7th day of June, 1921, nor at any other time, give notice in writing to the defendant, nor otherwise comply with the provisions in the policy relative thereto, and further that he did not within sixty days after the 7th of June, 1921, render the signed and sworn statement or any sworn statement as required by the terms of the policy, and that by reason of said failure so to do, he was precluded from maintaining this suit or any suit.

For a third Affirmative defense, defendant company quotes the following provision of the policy:

“This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void \* \* \* \* if the interest of the insured be other than unconditional and sole ownership.”

and alleges a violation of said provision upon the ground that the title to the property described in the policy of insurance was at all times in the Natural Mineral Water Company.

As a fourth Affirmative defense, the defendant Company quotes that portion of the policy to the effect

that the Company should not be liable beyond the actual cash value of the property at the time of any loss or damage and that the actual loss or damage should be sustained and estimated according to the actual value thereof, and alleges that there was no ascertainment whatever of the actual cash value of the property at the time the loss occurred; there was no estimate made and no appraisal made thereof at any time prior to the bringing of the suit.

Attached to the defendant's answer there is an Exhibit, purporting to be a letter addressed to the plaintiff requiring him to conform to the terms of his policy with reference to proof of loss and in other respects.

When the case was called for trial, plaintiff's counsel asked leave to amend the complaint in respect to the allegations of waiver set forth in paragraph VII, of the complaint and the court permitted the amendment of the complaint VII A., found on pages 32-33-34.

This amendment specifies certain acts of the adjusters which are alleged to be in the nature of a waiver of the clause of the policy requiring notice in writing and proof of loss.

At the trial of the case, after the jury was impaneled, defendant company objected to the introduction of evidence in the case upon the ground that the allegations of the plaintiff's complaint showed that plaintiff had no cause of action for the reason that the title to the property was in the Natural Mineral Water Company and that the Fred J. Kiesel Estate, named as mortgagee, was not a mortgagee and had no interest

whatever in the property and that before plaintiff could maintain the suit at law, he must come into equity and ask for a reformation of the contract because the contract sued on, according to the allegations of the complaint, was not the contract made, and was not the contract upon which the plaintiff sought to recover. This objection was overruled by the court and exception duly noted.

Evidence disclosed that the subject of the insurance covered by the first item was a building, situated upon the lots described in the complaint as Lot 5 and the N½ of Lot 4, Block 38, at Soda Springs, Caribou County, Idaho, known as the Idanha Hotel.

That the lots and building thereon were the property of the Natural Mineral Water Company, a corporation; that W. A. Clark and Fred J. Kiesel had some interest in the Natural Mineral Water Company, exactly what this interest was does not appear in the record and only inferentially.

The negotiations between plaintiff with reference to the purchase of this property were commenced in the year 1917, and were oral. Exhibits 1-2-3, record, page 491 and 492, are all dated in 1917.

There is a period of approximately three (3) years until the 12th of April, 1920, during which these negotiations apparently ceased.

Enders testified, that the title to the property was in the Natural Mineral Water Company; that the only interest he had in the property was by virtue of an agreement with reference to the deed, Exhibit 4, record



page 493; dated April 12, 1920. This deed was placed in escrow with the cashier of the bank at Soda Springs, Joseph T. Torgerson, under instructions in writing. He testified that all the instructions that he had from the party that submitted the deed to him, were in writing. Record page 222-223.

These instructions are identified as Exhibits 5-6, Record page 323-324.

Under Exhibit 5, dated May 11, 1920, Enders is informed that the deed is to be delivered to him on payment of \$4000 and that on receipt of the above amount, the deed will be forwarded to him.

Under Exhibit 6, dated June 14, 1920, the bank at Soda Springs is notified that the deed is enclosed to them for inspection by Mr. Enders' attorney and after Enders and his attorney have inspected the deed it is to be returned.

There is testimony that Enders requested that the deed be retained in the bank so that when the money was paid it could be delivered to him by the bank, instead of being returned to Heslet, who wrote Exhibit 6, record page 250; and this was the only modification of the agreement. The deed was never delivered to Enders. He never paid the four thousand (\$4000) dollars. There is not a particle of evidence to show that he ever paid anything upon the alleged escrow agreement which is embodied in Exhibits 4-5-6.

The negotiations in 1917, having ceased, nothing further was done in connection with the matter until 1920, when the deed referred to as exhibit 4 and the

letter referred to as exhibit 6, and the letter to Enders referred to as exhibit 5, embodying all the negotiations had with reference to the property passed. This is the only evidence of title in Enders.

No notice whatever in writing was given to the Company immediately after the fire occurred on the 7th of June, 1921. No statement of proof of loss signed and sworn to by Enders within sixty days after June 7, 1921, was ever given, the only sworn statement being dated September 20, 1921. Record pages 181-282.

August 19, 1921, the plaintiff was notified to conform to the terms and conditions of his policy and the requirements of the policy with reference to the proof of loss was specifically set forth. Exhibit 14, page 275.

Enders in the statement signed and sworn to by him, record page 281, made oath of the following statement: "That the Kiesel Estate had and holds an interest in said property as security in the sum of about \$5400.00." Record page 281. In his testimony he says that that statement is not true, and that the Kiesel Estate had no interest whatever as mortgagee or otherwise in the property.

He also testifies that the property was used as a laundry, and that this was a commercial laundry. There is no evidence whatever in the case to show that Enders owned the land upon which the building stood in fee-simple.

There was no evidence introduced on the part of the plaintiff tending in any way to show any binding

contract of agreement on his part to pay for the property.

There is no evidence in the case to show any authorization on the part of the directors of the Natural Mineral Waters Company to sell or dispose of the property, Exhibit 7, record page 494, was rejected by the court upon reference thereto.

The hotel was insured "only while occupied for hotel and apartment purposes." The evidence in the case shows that there was a commercial laundry connected in this hotel building at the time of the fire.

At the trial of the case, after the close of all the testimony, counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant upon the grounds specified in said motion which were the same grounds as those specified in the motion for a non-suit. This motion was denied by the court and thereupon the court instructed the jury, to which instructions the defendant counsel duly excepted in certain particulars and which exceptions were by the court overruled.

After the return of the verdict and the entry of judgment thereon a bill of exceptions embodying the testimony and proceedings at the trial was signed, settled, certified and filed in the case.

The questions involved, in this writ of error, are as follows:

1. The plaintiff's counsel asked and were allowed to file at the opening of the trial of the case an amend-



ment to the complaint specifying certain acts and omissions which were claimed on the part of the plaintiff to constitute a waiver of the requirements of the policy as to notice and proof of loss. Objection was made to allowance of this amendment upon the ground that the amendment stated no facts sufficient to constitute a waiver. This was overruled by the court.

The plaintiff had given no notice of the loss in writing to the Company. No proof of loss was given as required by the policy until more than sixty (60) days had elapsed after the fire. No fact was shown that would in any way constitute a waiver by the Company of the requirements of the policy in this regard.

This question is raised by the objection of the introduction of evidence in the case, and by the objections presented to the proposed amendment to the complaint and by the motion for a non-suit, and the motion for a directed verdict.

2. The plaintiff in his complaint sought to recover upon the ground that he had an insurable interest in the property, as vendee of an executory contract entered into with a corporation designated as Natural Mineral Water Company. He further states that under the terms of the policy, the Fred J. Kiesel Estate was named as mortgagee, when in truth and in fact the Fred J. Kiesel Estate had no interest whatever in the property, either as mortgagee or otherwise. He further sets forth in his complaint that he had certain oral negotiations leading up to the issuance of the policies with defendant's agent, William H. Jackson, Jr., and

that he was advised by this agent that the details with reference to the ownership of the property by Natural Mineral Water Company, and the interest of that Company therein, and that the interest of the Kiesel Estate would be properly set out and protected and the policy itself made to conform with the facts.

At the trial of the case no attempt was made whatever on the part of the plaintiff to recover in accordance with the terms of the policy. No effort was made and no proof offered to show a compliance with the terms of the policy. The statements of the pleadings precluded a recovery upon the ground that the terms of the policies had not been complied with.

Defendants objected to the introduction of any evidence in the case upon the ground that in as much as the plaintiff did not seek to recover upon the policy as written, nor in the terms, nor upon a compliance with the terms and conditions thereof, and did not seek to have the policy reformed in equity so as to conform to the facts as alleged in the pleadings, that he could not maintain his suit at law. This objection was overruled by the court.

This question was raised by an objection to the introduction of evidence in the case, and upon the motion for a non-suit and for a directed verdict.

3. The plaintiff in the complaint sought to recover as the vendee of an executory contract entered into between himself and Natural Mineral Water Company. To sustain this allegation he testified that in 1917 he had some conversations with Fred J. Kiesel, with ref-

erence to the purchase of the hotel and the land it stood upon. The nature of these negotiations is not specified. Some three years later, and in the year 1920, a quit claim deed, purporting to have been executed by Natural Mineral Water Company, by W. A. Clark, President, accompanied by a letter addressed to F. W. Kiesel, and a direction that the deed be placed in the bank at Soda Springs, to be examined by Enders' attorney, and then returned to Heslet, representing Clark. Torgerson, the cashier of the bank, who testified in the case, states that these letters constitute all of the instructions which he received in regard to this deed.

The price agreed upon to be paid for this property was four thousand dollars (\$4,000). The deed was to be delivered, upon the payment of the four thousand dollars (\$4,000). The four thousand dollars (\$4,000) was never paid.

These negotiations for the placing of the deed in escrow, if it could be called in escrow, were in the year 1920. Enders, in a letter dated March 28, 1919, which constituted a self-serving declaration on his part and which did not in any way show any sale of the property to him, refers to a payment of two hundred and forty (\$240.00) dollars for interest which he made to Fred J. Kiesel, and which so far as appears in the evidence did not constitute any payment whatever to the Natural Mineral Water Company.

There is no evidence in the case to show that Enders ever at any time bound himself in a legal way to pay



four thousand (\$4,000.00) dollars for the property as a present binding contract on his part, and that not until he testified in the case under the stress of the legal requirements as presented at the trial, did he ever assume that he was bound to pay for the property as a definite purchase on his part, and that as a consequence there was no fee simple title in him to the land, and there was no ownership on his part sufficient to comply with the terms and conditions of the policy relative thereto.

This question was raised by objections to the introduction of specific evidence to the charge of the court in certain specific particulars and in the motion for a non-suit and for a directed verdict.

4. The plaintiff offered no evidence whatever to show that he gave notice of the loss forthwith to the Company. He did not give any proof of loss as required by the policy until the 21st of September, 1921, more than three months after the fire, which occurred on the 7th of June, 1921.

The attempt to avoid compliance with this condition precedent of the policy is an allegation of waiver without facts and certain alleged conversations with an adjuster, none of which constituted in any way an estoppel of the right of the Company to defend on the ground of a non compliance with these conditions.

This question is raised by the objections to the specific testimony in the case, by the motion for a non-suit and for a directed verdict and by the specific exceptions to the charge of the court relative thereto.

5. The plaintiff in a sworn statement which he made to the Company specifically sets forth that the Kiesel Estate had a lien upon the property to secure an indebtedness in the sum of fifty-four hundred (\$5400.00) dollars. He states that this was untrue and that the Kiesel Estate had no interest whatever as mortgagee or otherwise in the property. In this respect he misrepresented in writing a material fact in connection with the policy, and the subject of the insurance and thereby voided the policy and precluded his right to recover thereon. There is no attempt on his part to explain this mis-statement except a general statement that the lawyer that he employed to prepare the proofs of loss didn't know what he was about.

This question is raised on the motion for a non-suit and a directed verdict and in specific objection to certain testimony and in certain objections to the charge of the court specifically set forth.

6. There was another question as to whether Kiesel had a fee-simple title to the ground upon which the building, the subject of the insurance, stood. The only evidence presented in the case is the quit-claim deed, which was placed in escrow, if it constituted an escrow, and there is no evidence whatever that this deed was ever delivered or that the insured ever had a title to the ground upon which the building stood.

This question is raised upon the motion for a non-suit and a directed verdict and in objection to specific testimony and in specific objections to the instructions of the court.

7. The insurance was valid "only so long as the building was occupied for 'hotel and apartment purposes.'" The existence of a commercial laundry upon the ground floor at the time of the fire was admitted and the occupation warranty violated thereby.

This question is raised on the motion for a non-suit and directed verdict and in specific objections to the charge of the court in relation thereto.

---

## ASSIGNMENTS OF ERROR.

The defendant in this action in connection with its petition for a writ of error makes the following Assignment of Errors which it avers occurred upon the trial of the cause, to wit:

### I.

The court erred in permitting the plaintiff to amend his complaint at trial of said cause.

### II.

The court erred in permitting the plaintiff to amend his complaint at the trial of said cause in order to plead a waiver in the nature of an estoppel by the adjuster, of the requirement of the policy that plaintiff furnish proof of loss to defendant.

### III.

The court erred in overruling defendant's objection to any evidence in the case at the opening of plaintiff's case after the first witness, Theodore Enders, had been produced on behalf of plaintiff and duly sworn.



## IV.

The court erred in holding that the provision of the policy "Loss if any on building only, subject however, to all the terms and conditions hereinafter set forth, payable to the assured and Fred J. Kiesel Estate, mortgagee," was immaterial to the right of the plaintiff to recover when it was made to appear that Fred J. Kiesel was not a mortgagee and had no interest in the property covered by the insurance or in the insurance itself.

## V.

The court erred in holding that the allegations of the complaint that the Fred J. Kiesel Estate was not a mortgagee and had no interest whatever in the property and that the Natural Mineral Water Company as the ultimate owner of the property or the person who had the ultimate title should have been made and specified as the beneficiary in said policy was an immaterial allegation and in no way affected the right of the plaintiff to recover.

## VI.

The court erred in holding that the plaintiff could recover in this action under the allegations of his complaint without any reformation of the contract of insurance to conform to the facts set forth in his complaint.

## VII.

The court erred in overruling defendant's objection to the following question asked of the witness Theodore

Enders, and permitting the witness to testify in response thereto, to wit:

Q. Did you have any negotiations with reference to the purchase of the Idanha Hotel and the land it stood on?

A. Yes, sir.

Q. Who did you have the negotiations with?

A. With the Natural Mineral Water Company, through Fred J. Kiesel, through Clark.

Q. W. A. Clark?

A. Yes.

Q. When was that, Mr. Enders?

A. You mean to say—

Q. When you had your first negotiations.

A. That was in 1917.

Q. Yes. Did you make arrangements for the purchase of the property at that time?

A. I did with Mr.——. I did, yes.

Q. You did, yes. Was that your answer?

A. Yes, I did.

Q. Were those negotiations with Mr. Kiesel orally?

A. Yes, sir.

### VIII.

The court erred in overruling the defendant's objection to the following questions asked of witness Theodore Enders.

Q. Did you purchase the hotel at that time, Mr. Enders?

A. Yes, sir.

## IX.

The court erred in permitting to be introduced in evidence and read to the jury Plaintiff's Exhibit "4" being "Quit Claim Deed" as follows, to wit:

THIS INDENTURE, made this 12th day of April, A. D., 1920, between Natural Mineral Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, the party of the first part, and THEODORE ENDERS, of Soda Springs, Caribou County, State of Idaho, the party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of FOUR THOUSAND DOLLARS (\$4000.00) lawful money of the United States of America to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell, convey and quit claim unto the said party of the second part, all of those certain pots, pieces or parcels of land situated, lying and being in Caribou County, State of Idaho, to-wit:

The North Half ( $N\frac{1}{2}$ ) of Lot Four (4) and all of Lot Five (5) in Block Thirty-eight (38) in Soda Springs, Caribou County, State of Idaho.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate name to be hereunto



subscribed by its President and its Corporate Seal affixed this 12th day of April, A. D. 1920.

NATURAL MINERAL WATER  
COMPANY.

By W. A. Clark,  
Its President.

Exhibit 4.

STATE OF NEW YORK,  
New York County, ss.

On this 12th day of April, A. D. 1920, before me, Amy Burgess, a Notary Public in and for said County and State, personally appeared WILLIAM CLARK, known to me to be the President of the Corporation that executed the above and foregoing instrument, and acknowledged to me that said corporation executed the same.

(Notarial Seal)

AMY BURGESS,  
Notary Public.

Residing at 561 W. 174th  
St., New York City.

My Commission Expires  
Notary Public New York  
Co., No. 316, New York  
County Register No. 2126.  
Term Expires March 30,  
1922.

X.

The court erred in admitting in evidence Plaintiff's "Exhibit 8" which is as follows:

April 12, 1920.

Mr. Fred W. Kiesel,  
Care California National Bank,  
Sacramento, California.

Dear Mr. Kiesel:

I received your favor of the 7th, together with the quit claim deed sent by Shearman for the hotel property to Mr. Enders, who is willing to pay \$4000 for the property, but I am not satisfied as to the description. It may be absolutely correct but I want to have it confirmed by someone who is thoroughly conversant with the location. I have submitted the deed to Mr. J. K. Heslet, Butte, Mont., who had a lease on the property for a while and before it is delivered I want to be sure that the description is correct.

Yours Sincerely,  
W. A. CLARK.

## XI.

The court erred in overruling defendant's objection to the following question asked of Witness Shearman and permitting him to answer the same to wit:

Q. Did you have any conversation with Mr. Clark with reference to this deed, with reference to negotiations for any escrow agreement between the Natural Mineral Water Company and Theodore Enders?

A. Yes.

Q. Will you relate what that was, Mr. Shearman?

A. Mr. Enders took up the matter of the sale of the property, or the purchase of the property, with Mr. Clark, and my best recollection is that he told Mr.

Clark that he would like to have the deed left at the Bank of Soda Springs, that it was more convenient for him and that he would take it up there, and Mr. Clark said as far as he was concerned that was perfectly agreeable.

Q. Now was there any other conversation with reference to the terms? Did Mr. Clark say anything with reference to the terms that the deed should be left there on?

A. At that particular time, I think not, not in my presence.

## XII.

The court erred in admitting in evidence Plaintiff's "Exhibit 9."

H. A. FALKENBERG,  
Architect.

Soda Springs, Idaho,  
March 28, 1919.

Mr. Fred J. Kiesel,  
309-310 Hudson Building,  
Ogden, Utah.

Friend Kiesel:

Received your letter of March 25th and I am inclosing in this letter check for Two Hundred, Forty and no hundredths (\$240.00) Dollars, which amount was agreed upon between us as yearly interest to be paid until I receive the deed for the property. I have not received the deed yet.

I have been in possession of the Idanha now for

about one year, having taken over the same about April of 1918. Everything is in about the same condition as when taken over.

Would suggest that I take a trip to Ogden in the very near future and then I can see you personally and talk all business matters over thoroughly with you. I can then answer all questions you may wish to ask.

Expecting to see you soon and with best regards, I remain.

Yours very truly,  
E/M/F THEODORE ENDERS.

### XIII.

The court erred in overruling defendant's objection to the following questions asked of Enders, and permitting the witness to answer the same:

Q. At that time did you have any conversation with Mr. Clark in Soda Springs with reference to the purchase of the Idanha Hotel?

A. I suggested to Mr. Clark that the deed be left in Soda Springs as it would be more convenient for me, and he said—he told me it would be all right and he said “Now Mr. Enders,” he said, “I want you to understand everything you done with Mr. Kiesel I am going to back up.”

A. He means to say that Mr. Kiesel, what I talk with him, and bought the Mineral Water Company property, after he died he take his place and it would be just the same with him as it was with Mr. Kiesel,



that he back Mr. Kiesel up, and the deed shall be left there in the Soda Springs bank, and on me paying the \$4000.00 then I shall receive the deed.

Q. When you pay the \$4,000 you were to receive the deed?

A. Yes.

#### XIV.

The court erred in permitting Witness Enders to testify, over defendant's objection, as follows:

A. I told Mr. Clark, I says, "How about payment, Mr. Clark? Mr. Kiesel agreed to give me six years' time to pay it in," and he said, "that will be all right, Mr. Enders, six years' time to pay it at six per cent, and they wasn't in any hurry, they didn't need the money very bad, they didn't want to press me any. He said, "We know, Mr. Enders, we want you to have that property, and we know you are entitled to it; you have worked for us the last twelve years, and we have tried to show you that we are your friend, we try to do something for you,"

A. From the time I took it over.

A. That was the 1st of February.

#### XV.

The court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's "Exhibit 23" and permitting the same to be read to the jury as follows, to wit:

Mr. Davis: Plaintiff's Exhibit 23; (Reading).

WILLIAM H. JACKSON, JR.,  
LOANS, REAL ESTATE,  
INSURANCE.

Pocatello, Idaho,  
June 15th, 1921.

Fred J. Kiesel Estate,  
Col. Hudson Bldg.,  
Ogden, Utah.  
Gentlemen:

I have your letter of the 14th inst. regarding the insurance on the Idanha Hotel at Soda Springs.

I think the adjusters are working on the loss now and will probably want the policies within a short time and when they do I will let you know.

I will keep you advised as the case progresses.

There is nothing we can do at present.

Yours Truly.

WM. H. JACKSON, JR.,

By R. D. Hoskinson

WHJ-H

## XVI.

The court erred in overruling the defendant's objection to the following question asked of Witness Enders, and permitting witness to testify in response thereto as follows:

Q. Mr. Enders, during the year from about June 7th, 1920, until June 7th, 1921, what was the average income to you per month from the Idanha Hotel, exclusive of the expense in operating it?

A. I took a figure on it for three years, and the net income was \$220 per month.

## XVII.

The court erred in overruling defendant's objection to Plaintiff's "Exhibit 27" and permitting the same to be read in evidence to the jury as follows, to wit:

General Office of  
WILLIAM A. CLARK,  
BUTTE, MONTANA.

August 27, 1917.

Mr. Fred J. Kiesel,  
Ogden, Utah.

Dear Sir:

Referring again to your favor of the 1st inst. to which I replied with the suggestion that possibly the parties desirous of purchasing the hotel at Soda Springs might be willing to increase the price. Will you kindly let me know what, if anything, was done. I however suggest to you that it would be better to take \$4000 rather than miss the sale,"

MR. DAVIS: The last paragraph I won't read; it has nothing to do with the case.

## XVIII.

The court erred in overruling defendant's objection to plaintiff's "Exhibit 28" and permitting the same to be read in evidence to the jury as follows, to wit:

BRITISH & FEDERAL FIRE UNDERWRIT-  
ERS OF LONDON AND NORWICH, ENG-  
LAND.

PACIFIC DEPARTMENT, 234 Sansome Street,  
San Francisco, Cal.

San Francisco, Cal.

Oct. 19, 1921.

Mr. William H. Jackson, Jr.,  
Agent,  
Pocatello, Idaho.

DEAR SIR:

CLAIM UNDER POLICY NO.  
54277, ENDERS.

I have for acknowledgment your letter of the 14 inst., in which you make inquiry as to the status of this claim owing to the great length of time since the fire occurred.

I can only say that circumstances surrounding the case are very unsatisfactory with respect to the title as affecting the real property described in the policies of insurance.

The case is in the hands of the adjusters and will be dealt with upon its merits or demerits as may be shown by the facts in the case when they may be unravelled.

I can only say that we must await the result of our adjuster's further action in the matter.

Yours very truly.

J. L. FULLER,

Manager.



## XIX.

The court erred in overruling and denying defendant's motion for non-suit in said cause which said motion was as follows, to wit:

MR. SHELTON: Now comes the above named defendant, and moves the Court to grant a non-suit in this case, upon the following grounds:

1. That plaintiff has failed to show that he was the sole and unconditional owner of the property, namely, the Idanha Hotel, but was the owner of the option to purchase.

(a) The deed was placed in the Bank of Soda Springs to be delivered to him upon the payment of \$4000 and he has never paid that sum, or any part thereof.

(b) The agreement on which he relies does not bind him to make the payment unless he so elects, and there is no valid contract which can be enforced to compel him to pay the amount, hence the loss necessarily falls on the owner of the property to wit: The Natural Mineral Water Company.

(c) The agreement which he claims to have had with Kiesel and Clark might bind them to convey to him, but there is no evidence to establish that they could enforce collection and compel him to purchase the property if he did not so choose.

(d) The Natural Mineral Water Company is not shown to have ever authorized the execution or delivery in escrow of any deed, or any deed whatever, to the plaintiff, and the deed executed by Clark is not

authorized by any vote of the board of directors, and without seal, and is without validity.

(e) It is necessary, for plaintiff to recover, that he show clearly and by competent evidence that he was the unconditional owner of the property, by clear and positive proof.

2. The plaintiff must show, as a condition precedent to his right to recover, that he gave notice as required by the terms of the policy, and that he furnished the proof of loss required by the terms of the policy within the sixty days specified, and failure so to do preclude his recovery. The waiver of the proof of loss attempted to be pleaded is not established by any evidence, and plaintiff has no valid excuse for not complying with the terms of his policy under the terms thereof.

3. The policy provides that the entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material facts or if the interest of the assured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss. Plaintiff specifically sets forth in his proof of loss, sworn to by him and made in the form of an affidavit, that the Kiesel Estate holds a lien upon the property to secure an indebtedness in the sum of \$5400. He stated on the stand that this was untrue, and that the Kiesel Estate had no mortgage or lien upon the

interest or interest in the property whatever. He stated the same thing in his complaint and thereby the policy became void by expressed condition therein contained.

4. The policy contained the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of the insurance be a building on ground not owned by the insured in fee simple." The subject of the insurance as specified is as follows: "On the three-story shingle roof frame building and its additions if any, of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring, and stationary heating and lighting apparatus and fixtures, also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building only while occupied for hotel and apartment purposes, situate No. 70-75 on the east side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho."

The plaintiff at no time ever had a fee simple title to the ground on which the building stood.

5. The insurance was valid and enforceable only so long as the building was occupied for hotel and apartment purposes. The five rooms on the ground floor were occupied by a commercial laundry, and thereby the terms of the policy were invalidated and the insurance ceased.

## XX.

The court erred in overruling and denying the defendant's motion to instruct the jury to find a verdict for the defendant upon the grounds embodied and specified in the motion for a non-suit.

## XXI.

The court erred in instructing the jury as follows:

"If upon the other hand you find that he had possession of the property under an agreement with the owner, the Natural Water Company, Mineral Water Company, if he had possession of the property under an agreement that they would sell to him and give a deed for a certain stipulated price and within a certain length of time, and upon certain specified conditions, and upon the other hand he himself had entered into an obligation to take it upon that condition, so that the minds of the two parties met, one being obligated in law to sell and the other being equally obligated in law to buy, so that if he didn't pay the \$4000, the Mineral Water Company could have sued him and recovered judgment against him for the amount, I say if those were the conditions, then the contract was not a mere option, but was absolute on the part of each party thereto, and under the construction to be put upon this clause in the policy he would be the unconditional and sole owner of the property. You will see that under the facts of the case the critical question upon that defense is as to whether or not Mr. Enders had a mere right to purchase



if he wanted to or whether he had bound himself to purchase, to buy, and hence had become absolutely obligated to the company to pay the \$4000.

## XXII.

The court erred in instructing the jury as follows, to wit:

“Of course you will understand, gentlemen, that this defense is applicable only to the statements of the insurance policy covering the building; it hasn’t anything to do with the personal property, the contents of the building, for as I understand, no question is raised here as to the ownership of the personal property. Is that not right? There is no question raised as to the ownership of the personal property?”

## XXIII.

The Court erred in instructing the jury as follows:

“To be more specific, if before the sixty-day period expired, here, the insurance company, through its agents and adjusters, lulled the plaintiff into the belief, and he acted reasonably under all the circumstances, if, I say, acting reasonably, he was lulled into the belief, lulled by them, that these formal proofs were unnecessary, that they would not be required, that he need not go to the trouble of making them, and permitted him to act upon that belief until his sixty-day period had expired, then the companies would be estopped, they would not be heard to set up a defense or to demand compliance with that provision. You have heard the

testimony upon that point, and you are to say whether or not the companies, through their agencies, did so lead the plaintiff to believe, and whether he did act reasonably in acting upon such belief. You may consider, too, the conduct of the defendants as shown by their authorized agents, even after the sixty-day period elapsed, as bearing upon the question as to whether or not they intended to demand compliance therewith. Consider the letters which were written and the conversations which were had, as you may find them to be, and say whether or not there was a waiver, whether both parties understood that compliance with this provision in the policies was to be waived.

#### XXIV.

The Court erred in instructing the jury as follows, to wit:

“There is a third proposition by way of defense, to which I have in an indirect way at least already alluded, but it is based upon this provision of the policy; ‘This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud of false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.’ You may say whether or not the plaintiff did act fraudulently, did wilfully make false representations,

either before or after the loss. Your attention, I think, has already been called to a certain proof of loss, sworn proof of loss, which he tendered to the insurance companies or their adjusters after they wrote him a letter advising him that he must comply with the terms of the policies, fully comply, and thereupon it seems he sent in this formal proof of loss, which was sworn to. Attention is called to the fact, as claimed by the defendants, that there are false statements, material statements, as to his ownership of the property and what was due upon it, and the interest of other persons in the property, and if you find that he thereby intended to defraud the defendants or mislead or deceive them, in those sworn proofs and swore falsely as to material facts touching these matters, which were matters of material interest and inquiry to the insurance companies, then you should enforce this provision in the policy, which declares that it shall be void in case of fraud or false swearing by the insured touching any matter relating to the inquiry or the subject thereof, whether before or after loss.

## XXV.

The Court erred in refusing at the request of the defendant to instruct the jury that in the proof of loss it was specifically stated that there was a commercial laundry in operation, and that the policy was not in force or effect so long as the building was not confined entirely to hotel and apartment purposes.

## XXVI.

The court erred in instructing the jury as follows:

“Now I have further to say to you that while that is an express, binding provision in the policy, and compliance therewith is a condition precedent to the right of the insured to recover, it may be waived by the insurance company, or the company may act in such a way that it is to be regarded as estopped, as we put it, from setting up such an objection or defense; and the contention of the insured here, Mr. Enders, is that these companies did so waive compliance with this provision and did so act that they should be held to be estopped. By estoppel, generally speaking, is meant that where relations exist between the parties, as here, and one of them is supposed to do something before he has a right to demand performance on the part of the other if the other party, here the insurance company, acts in such way as to mislead the insured, to his loss, then the insurance company cannot be heard to assert its right under the policy.”

## XXVII.

The Court erred in submitting to the jury the question of whether the plaintiff was the owner in fee-simple of the property covered by the insurance, and failing to instruct them that under the allegations of the complaint that he was the owner in possession of the property under an executory contract of sale and not the owner in fee-simple.



## XXVIII.

The Court erred in rendering and entering judgment for the plaintiff on the verdict of the jury.

## XXIX.

The Court erred in receiving and accepting the verdict of the jury in favor of the plaintiff and against the defendant.

## XXX.

The Court erred in ordering judgment for the plaintiff and against the defendant.

---

ARGUMENT.

THE OMISSION OF THE PLAINTIFF TO GIVE WRITTEN NOTICE TO THE COMPANY OF THE LOSS AND TO FURNISH PROOF OF LOSS WITHIN THE SIXTY (60) DAYS REQUIRED BY THE POLICY PRECLUDED RECOVERY, UNLESS WAIVED. NO FACTS SUFFICIENT TO CONSTITUTE A WAIVER ARE SET FORTH IN THE COMPLAINT. THE AMENDMENT TO THE COMPLAINT CONTAINED NO STATEMENT OF FACT SUFFICIENT TO SHOW A WAIVER, AND NO EVIDENCE OR ADEQUATE PROOF SUFFICIENT TO SHOW WAIVER WAS PRESENTED AT THE TRIAL.

## I.

The attempt to plead a waiver in the complaint is as follows:

“That immediately after the destruction of said insured property by fire, and on the same day, the plaintiff notified Wm. H. Jackson, Jr., the defendant’s agent, of Pocatello, Idaho, of said total loss by fire; that thereafter and within forty-eight hours after June 7th, 1921, said Wm. H. Jackson, Jr., notified the defendant herein by telegram and by written notice of the loss and destruction of the insured property by fire; that in response to said notification given to the defendant’s agent by this plaintiff, the defendant sent its agents and adjusters to the scene and place of said fire for the purpose of adjusting said loss; that said adjusters, agents and representatives of the defendant came to Soda Springs, Idaho, and investigated said loss and inspected the premises where the insured property had stood; that by the sending of adjusters, agents and representatives to inspect and adjust said loss, the loss being a total loss, the defendant waived any further notice and proof of loss by the plaintiff and waived written proof of loss within sixty days as required by Exhibit ‘A’ annexed hereto.

## II.

The amendment to the complaint allowed to be filed by order of the Court at the trial of the case is as follows:

On or about June 29, 1921, in the office of defendant’s adjusters, Croxford & Young, at Salt Lake City, Utah, one W. H. Shearman, agent of the plaintiff, had a conversation with the defend-

ant's adjusters, at which time he informed the said Young that the plaintiff had requested that he take up with said adjusters the matter of adjusting the loss occasioned by the fire aforesaid, and that at said time and place the said Young stated to the said W. H. Shearman, that he, Young, had been to Soda Springs, Idaho, for the purpose of adjusting the loss by fire of the property covered by the said policy and that he had found in inspecting the premises, that there was a total loss of the property so covered, whereupon the said W. H. Shearman in behalf of said plaintiff asked the said Young what it was necessary for him to do as he was anxious to supply any information or reports desired or necessary, and that at said time the said Young told him there was nothing at that time that could be done and that there was nothing that he wanted from the said Shearman or the plaintiff at that time, but that he was looking after the adjustment of the matter and would call upon the said Shearman and the plaintiff for such further information and reports as might be desired, and that the said Young thereafter did call upon the said W. H. Shearman for certain information and reports, all of which were supplied as aforesaid.

That on the 19th day of August, 1921, defendant requested the plaintiff to make a sworn statement setting forth the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and all others in the property, the cash value of each item thereof, and the amount of loss thereon, all encumbrances

thereon, all other insurance, whether valid or not, covering any of said property, a copy of all description and security of all policies, any change in the title, use, occupation or exposure of said property since the issuance of the same, by whom and for what purpose the building described in said policy of insurance and the several parts thereof, were occupied at the time of the fire; that pursuant to said request this plaintiff, at considerable time and expense to himself, furnished the defendant with such statement, which was accepted without objection by the defendant, and that for many months thereafter the defendant, through its agents and adjusters, continued further negotiations looking to a settlement and adjustment of the loss caused by said fire, and during said time requested and obtained at expense to the plaintiff written information and documents pertaining to plaintiff's title to said property, and at no time indicated to plaintiff that payment of the said policy would be refused on account of failure to furnish written proof within a period of sixty days, as mentioned in said policy, and that the said defendants, by its acts and conduct, as aforesaid, and by reason of the matters and things in this complaint alleged, has waived proof of loss as required in said policy and on account of its acts and conduct as aforesaid is estopped from setting up any defense on the grounds of failure to furnish proof as set forth in said policy.

The policy also contained this clause:

"If fire occurs the insured shall immediately



give notice of any loss thereby in writing to this society."

"It also contains: 'And within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured.'"

The giving of notice and the furnishing of proof of loss within the time specified is a condition to the precedent right of the plaintiff to maintain a suit upon the policy, which in this regard reads as follows:

"No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

The plaintiff admits in paragraph 7, of his complaint above quoted, a failure to comply with the condition of the policy relative to notice and furnishing of proof of loss.

The allegations of the paragraph quoted attempting to show a waiver on the part of the defendant Company of performance are in direct conflict with the provisions of the policy.

With regard to waiver the policy contained the following provision:

"THIS POLICY IS MADE AND ACCEPTED subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby

specifically referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed herein or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto and as to such conditions, provisions, no officer, agent, or representative shall have such power or be deemed or held to have waived such conditions, provisions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or omission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The policy also contained this provision:

"This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

The allegation of paragraph 7, is that the plaintiff notified Jackson, defendant's agent, of the loss, and that Jackson sent a telegram and written notice. This is not the notice required by the policy and is wholly ineffectual as a compliance with the terms and conditions of the policy. Plaintiff then sets forth that the defendant sent his agents, and adjusters to the place of the fire for the purpose of adjusting the loss; in-

vestigated and inspected the premises and thereby waived any further notice of proof of loss by plaintiff and waived written proof of loss within the time required. This was wholly ineffectual under the express terms and provisions of the policy which has provided as above set forth, that the society shall not be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal, or to any examination provided for in the policy and an examination and inspection is specifically provided for in the policy. The amendment of the complaint above quoted sets forth no fact whatever that in any way tends to show a waiver on the part of the company, of notice of loss or proof of loss, the allegation being that one Shearman, acting as agent for the plaintiff had a conversation with Young, an adjuster, and told him that he was ready to furnish whatever information was necessary and that Young told him he didn't wish anything at that time and would let him know later if he desired any information, and had obtained from Shearman certain information later.

This constituted no waiver whatever on the part of the Company of the proof of loss required by the policy.

The plaintiff further in the amendment sets forth that on the 19th day of August, 1921, after the period of sixty (60) days had expired he was notified to furnish the sworn statement required by the policy, and that the plaintiff furnished a statement thereafter.

This statement, he says, was retained by the defendant company without objection.

The request for this statement and the furnishing thereof constituted no waiver whatever on the part of the defendant Company of the requirement of the policy in this regard and the order of the Court permitting the amendment to be filed was error.

The grounds upon which the allegations of paragraph 7 of the complaint are insufficient to constitute a waiver of the terms of the policy, are as follows:

1. Jackson is not alleged to have had authority from the Company to accept notice of loss and no written notice to Jackson or to the Company is shown; no endorsement or written waiver of the terms of the policy required by the provisions thereof are alleged.

2. The allegation that the defendant Company sent its agents and adjusters to investigate the loss and inspect the premises constituted no waiver of notice and proof of loss.

3. The allegation in the amendment to the complaint that Young in his conversation with Shearman told Shearman that there was nothing that he wanted at that time, but would call upon Shearman and the plaintiff for further information and reports he might desire and later did call for certain information which was supplied constituted no waiver by the Company of proofs of loss.

Young is not shown to have had any written authority to waive proof of loss and no waiver of proof of



loss is endorsed on the policy or shown to have been made in writing.

4. The second allegation as to the request by defendant of plaintiff for a sworn statement is alleged to have taken place more than sixty days after the fire, which occurred on the 7th of June, 1921, and could not waive a forfeiture already taken place.

5. The sworn statement requested was merely a demand upon the plaintiff to furnish a proof of loss in accordance with the terms of his policy. The evidence presented by the plaintiff at the trial to sustain the allegations of waiver of notice and proof of loss is insufficient as follows:

(a) Enders testifies:

A. "I notified Jackson, the man what made out the insurance, that the building burned down. I telephoned. I told him the Idanha burned down. He said, 'I will notify my company at once.' "

(Record page 271).

He saw Jackson a week or so afterwards and he said:

"Well, he told me he got word from the Company that the adjuster would be up there and adjust the matter in a very short time, but didn't know exactly the date at that time, but a little bit later on he told me the date."

(Record page 272).

Enders in his letter to Croxford and Young, dated August 21, in reply to the notification of August 19, 1921, states (Record P. P. 275-278):

“With regard to that part of the insurance contract permitting sixty days in which for the insured to make proper claim, may I state that I advised agent Jackson at Pocatello, Idaho, of the fire immediately thereafter, and had supposed that he was handling the matter for my interests.”

This clearly shows that Enders treated Jackson and looked upon him, not as the agent of the Company, but as his own agent.

Now taking up the allegation of the amendment to the complaint:

In regard to the action of Shearman in the conversation which he had with Young.

The first conversation between Shearman and Young (Record p. p. 353-354).

A. “I went down to their office, and I was under the impression that I saw Mr. Croxford there first, but as long as he was in Europe, I certainly was mistaken, and who the man was that told me that Mr. Young has just been up there, or was making the adjustment, I don’t remember. I know nearly all of them in that office. I thought it was Croxford. So then I talked to Mr. Young. Of course, I was anxious to know all about it. I asked him what kind of a loss they had had, and he said it was a total loss, everything had burned to the ground, and I asked him what caused the fire, and then he stated to me he thought Enders had had a hand in it. He said that he had been there and found that Enders didn’t have a very good

reputation, that he was very heavily involved, that he had insured the building for more than it cost him, that he had said he owned it and he didn't have title, and that it was mortgaged, and that he was under the impression or he felt from his investigation that Mr. Enders had had a hand in burning down the building. I told him I had known Mr. Enders several years, and that certainly surprised me, that nothing could make me believe that, no matter how hard up Mr. Enders was that he was not the kind of a man that would do a thing like that. I told him that while Enders might not have title, he bought the building, and had been in possession of it, and \* \* \* \*

Upon objection being made to the court the objection was sustained.

Shearman states that he told Mr. Young as follows (Record p. 357).

"I told him that the transaction had been—had gone to the office of Fred J. Kiesel Company, and that we would be very glad to furnish them any documents or proofs or anything that they required."

Q. What did he tell you?

A. He told me that if they needed any thing that he would call upon me.

Q. What did he tell you with reference to whether he wanted anything then or not, at that time?

A. I don't think he asked me for anything at that time; I am not quite certain.

Q. Did he later call upon you for information?

A. Several times.

Q. Did you give them that information?

A. Yes, sir.

Q. But did you give them all the information they asked you for?

A. I did, and they also asked me to get information from Mr. Enders, which I did.

Q. Did you communicate to Mr. Enders the result and the substance of your first interview with them there?

A. Yes.

Q. You say they did call on you later for information and proof—what was that?

A. Later Mr. Young asked me to give him a history of the entire transaction, and I looked through all our records, and, remembering everything I could, I wrote Young and Croxford a complete history of the transaction, insofar as I could find anything or remember it.

Q. Did they ask you for any information that required you to call upon Mr. Enders for anything after that?

A. Yes, they asked me to obtain from him a detailed account of his expenses, I think it was, in repairing the building, or making some repairs. Whether they had received a statement from Mr. Enders before and wanted me to confirm it or not, I don't know. I wrote to Mr. Enders and he sent me a statement, but it was written so badly and kind of scratched that I couldn't tell anything about it myself, and I sent it back to him and asked him to send me a statement I could read.



Q. Did you furnish that statement?

A. Yes, sir.

Q. How long was that after the fire?

A. I think that was in the month of December.

Q. Now after August 19th, did you have any conversations with them?

A. Yes, a good many.

Q. Where were those—in Salt Lake?

A. Some of them were in Salt Lake and some in Ogden.

Q. Yes, and they were with reference to this loss?

A. Yes, sir.

Shearman states further:

“I sent them a copy of the deed on the 9th of November, 1921. (Record page 370).

Shearman further states:

A. As I recollect it, I offered to furnish any proofs or documents that we had, or to do anything they wanted me to, to help settle the matter, and Mr. Young said he didn't want me to do anything then, that he would call upon me when he did want something. (Record page 372).

On cross-examination he stated that:

A. “I think I told him I would do anything that he wanted me to do, to straighten the matter out, give any information I could or do anything.” (Record page 374).

Shearman says he couldn't remember that he did anything in connection with this matter prior to the 7th of August, that he went east about that time and was gone all of the month of August. (Record 375).

Q. Nothing was ever said to you in any way regarding proofs of loss, technically so-called?

A. How do you mean? No.

Q. Never mentioned in any way?

A. They never asked me for any.

Q. They were never mentioned, were they?

A. Not that I remember. (Record, p. 376).

Lawrence C. Young testified that prior to the 9th of July, he went to Soda Springs to inspect the premises as an adjuster. This constitutes the entire testimony in the case in support of the allegations of waiver of notice and proof of loss.

In light of this testimony and of the allegations of the complaint and the amendment thereto it is manifest that under the decision of the Federal Courts there is no sufficient allegation of waiver contained in the pleadings and no evidence whatever to sustain the position of plaintiff that there was a waiver in the nature of an estoppel, which precluded the defendant from relying upon the breach of the condition of the policy with respect to notice and proof of loss.

The position taken by plaintiff's counsel in the case as outlined in the argument upon the objection to testimony found in the record (p. p. 362-366), there they assume that the decision of the Supreme Court of Idaho

must govern. The holding of that Court being to the effect that the requirement of the policy for notice and proof of loss is of no binding force or effect upon the assured, and that he can ignore the provisions of the policy in that regard, and still recover.

This contention is absolutely at variance and contrary to the decision of the Federal Courts.

The case of Northern Assurance Company vs. Grand View Building Association has settled for all time, so far as the Federal Courts are concerned, the principle that where the parties have made their own terms and assented to certain conditions the court cannot change them, nor permit them to be violated or disregarded.

The Supreme Court in that case enunciated certain principles, among others which must be controlling in Federal Courts: (183 U. S. 234).

That contracts in writing if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts or other subjects, \* \* \* that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing

attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

In the case of *Penman vs. St. Paul F. & M. Co.*, 216 U. S. 311; 54: 493.

The court, in holding in accordance with the decision of the Court in the case of *Norway Insurance Company vs. Grand View Building Association*, *Supra*, said:

"We think also that the policy furnishes the only way by which its terms can be waived. It provides against modifications by the usage or customs of trade and manufacture. It guards against any acts of waiver of its conditions or a change of them by agents. It provides that such waiver or change \* \* 'shall be written upon or



attached' to the policy. The company could have used no words which would have been more explicit. There is no ambiguity about them. Parol testimony was not needed nor admissible to interpret them. They constitute the contract between the company and the insured. No agent had power to change or modify that contract except in the manner provided. This was decided in *Northern Assurance Co. vs. Grand View Bldg. Asso.* supra. Any other ruling would take from contracts the certain evidence of their written words, and turn them over for meaning to the disputes of parol testimony."

In the case of *Imperial Fire Ins. Company vs. County of Coos*, 151 U. S. 452, 38: 231; the court, in discussing the nature of contracts of insurance, says:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policies embodying the agreement of the parties. For comparatively small consideration the insurer undertakes to guarantee the insured against loss or damage upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the con-

tract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The Courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

In the case of *Lumber Underwriters vs. Rife*, 237 U. S. 605, 59: 1140, the Court said:

"When a policy of insurance is issued, the import of the transaction, as everyone understands, is that the document embodies the contract. It is the dominant, as it purports to be the only and entire, expression of the parties' intent. In the present case this fact was put in words by the proviso for the indorsement of any change of terms. Therefore when, by its written stipulation, the document gave notice that a certain term was insisted upon, it would be contrary to the funda-

mental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received. \* \* \* \* Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause."

It would be idle to cite other authorities to show that the rule in the Federal Court as announced by the Supreme Court of the United States is entirely at variance with the holding of the Supreme Court of Idaho as announced by counsel for plaintiff.

The question therefore is, whether there was any such pleading of facts in the complaint and amendment thereto as would constitute a waiver of the terms of the policy.

The principle is elementary that in order to show a waiver the plaintiff must set forth all of the facts, representations and matters relied upon with definiteness and particularity.

In the case of *Sosse vs. Order of United Commercial Travelers*, 154 N. Y. Supp. p. 558.

The question as to the insufficiency of the allegation

of waiver was disclosed and after citing numerous cases to sustain the conclusion of the court said:

“It seems to me, under these authorities, that the complaint was fatally defective for failure to plead the facts claimed to constitute waiver, that this point was taken promptly at the opening of the case and persistently insisted upon to its close, and that defendant was entitled to a dismissal.”

Again in the case of *Continental Inv. Co. vs. Chance* (Okla.) 150 Pac. 114, the Court said:

“All the facts relied upon to constitute a waiver must be alleged with definiteness and particularity before evidence to show the same can be received.”

Under this principle it is plain that there was no attempt whatever on the part of the plaintiff to plead any facts whatever, with definiteness and particularity showing a waiver of notice of proof of loss on the part of the Company.

The authority of Jackson as agent, to receive notice has never been plead or shown, neither is there any authority whatever shown in *Young or Croxford & Young* to waive proof of loss.

The case of *Tuttle vs. Pacific Mutual Life Ins. Co.* 58 Mont., 121, 134, 135, the question arose as to the right of a local agent to receive notice and the court in passing upon this question, stated:

“In the absence of proof that the facts related were communicated to the home office, notice to



the local agent during the informal conversation held shortly after the disappearance of Ora Tuttle, could not, under any circumstances, be held to meet the requirement of the contract that immediate notice be given to the 'Company at its home office.' ”

As was said in *Hatch vs. U. S. Casualty Co.* 197 Mass. 101, 125 Am. St. Rep. 332, 14 Ann. Cas. 290. 14 L. R. A. (n. s.) 503, 83 N. W. 398:

“The promise to insure is not absolute but conditional. The condition is that the notice, whatever it may be and by whomsoever or whenever given shall be given. It is a condition precedent to the creation of liability or the life of the promise; or, to put it perhaps in a better way, the giving of the notice is one of the essentials of the cause of action. \* \* \* If it be said, as it sometimes is, that such a defense is purely technical, the answer (if one is needed) is that the provision for notice is of the essence of the contract, that it is manifestly an important provision for the protection of the insurer against fraudulent claims, and also against those which, although made in good faith, are not valid. It is a provision which tends to the elucidation of the truth when the claim for indemnity is made. It was one to which the insured agreed and it is not unreasonable.”

The giving of the notice of the accident, and the forwarding of affirmative proof of death, are two separate and distinct obligations. Under the circumstances of this case, the latter obligation could

not be met until after the discovery of the body and a determination of the cause of death, if it was then possible; but the fact of the accident, if any, with its attendant circumstances, was known to plaintiff within a few days after the disappearance but no notice thereof was given until June 19, 1911, nearly seven months thereafter.

In the case of *Foster vs. Fidelity & Casualty Co.* 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69, it was held that:

“Where the beneficiary satisfied herself after investigation that her son’s death was accidental, but did not give notice until twenty-nine days thereafter, she did not bring herself within the requirement of ‘immediate notice.’ ”

The court, in passing upon the question as to waiver by an agent, said: 58 Mont. 136.

“As to waiver, the insurer and the insured mutually agreed that ‘no waiver’ \* \* \* shall be valid unless in writing at the home office and signed by the president or vice-president and also the secretary or assistant secretary.”

“Where the policy contains a provision against waiver by an agent it is both notice to and agreement by the policy-holder that no agent of the company has authority to waive the condition.”

In the case of *Aetna Ins. Company vs. Peoples Bank* 62 Fed. 222, the question arose upon a condition in

the policy which required the insured to furnish a certificate of a magistrate or notary, not interested in the claim nor related to the insured, and that no action should be sustainable on the policy until after full compliance with its requirements. The certificate furnished was made by one who was related to the insured and was not shown to be the magistrate or notary living nearest the place of the fire. In holding that there could be no recovery upon the policy for breach of this condition, the court said:

“The parties have made their own contract, have agreed on their own terms, and assented to certain conditions. The court cannot change them, and must not permit them to be violated or disregarded. They may be hard to comply with. The conditions may seem harsh or useless, but the contract has been duly made by parties capable in law to enter into it, and they have provided the terms and restrictions usual in such agreements, such as have been found from long business experience to be essential to the safe and proper disposition of such matters. The courts have uniformly enforced them. If they have not been waived, or one party been prevented from complying by the act of the other, they must be respected and enforced. From the earliest cases on fire insurance policies to the present, these conditions have been sustained. The following cases show their necessity, and the reasons given for requiring their enforcement.”

When the case came up again in the court below the plaintiff was allowed to amend by alleging a waiver by the Company's agents of the Notary's disability, a non-suit was directed at the close of plaintiff's evidence and plaintiff sued out writ of error to the Court of Appeals, it was attempted on the trial of the case to show that the insured had made a thorough investigation on its own account of the facts and circumstances connected with the fire, and it was also attempted to be shown in evidence that the insurance company had elected to contest the claim upon the grounds that it was fraudulent. This evidence was rejected by the court and the court held in that case that in as much as it appeared that the party insured, some days after he had been informed that the company intended to reject his claim, he prepared and sent to the company certain proofs of loss and also a certificate which it was claimed had been waived by virtue of the statements of the agents. The court held that the fact that the Company made a thorough investigation on its own account before receiving the proofs of loss is not evidence of a waiver of the requirements of the policy in respect to such.

Peoples Bank vs. Aetna Ins. Co. 74 Fed. 507.

In the case of American Cereal Co. vs. Western As-sur. Co. 148 Fed. 77, the court, after commenting on the fact that the Statute of Iowa had changed the rule of law relative to proofs of loss, said:

"The furnishing of such proofs is not a condi-



tion of the insurance, but is a condition precedent to the right of action to recover for the loss, and unless they are waived by the insurer the action cannot be maintained until they have been furnished."

In the case of *San Francisco Assur. Co. vs. Standard Leather Co.*, the question arose as to whether immediate notice was given of the loss, it appearing that the assured delayed giving notice for a period of thirty (30) days. The policy required that immediate notice of the loss should be given and in discussing this question, the court said:

"Equally fatal to the plaintiff's case was the failure to give immediate notice of loss, as required by the policy. The fire occurred July 12, 1904, and the proofs of loss which were not sent in until August 11th, some 30 days afterwards, was the first attempt to comply with this requirement. This in an important provision, the obvious purpose of which is to enable the insurer while the facts are fresh, to investigate the cause of the fire and the extent of the loss, and it is not to be frittered away by overindulgent construction favoring the assured upon grounds which are purely personal."

In the case of *Scottish Union vs. Encampment Smelting Company* 166 Fed. 231, the question arose as to a waiver of the proofs of loss by an agent of the Company. The policy provided that in case of loss a written and certified proof of loss should be made by

the insured containing certain detailed information, the policy also contained the provision that no officer or agent of the company had power to waive any of the conditions of the policy except in writing endorsed thereon or attached thereto. The court in holding that failure to make such proof of loss was not excused by claimed waiver not in writing by an agent of the company not shown to have any express authority to make it and whose action was not ratified by the company said:

“The doctrine is a reasonable one. It tends to promote certainty in the proof of transactions, and to inculcate a salutary and wholesome regard for the very terms of a contract when deliberately put in writing by competent parties. There is, therefore, no escape from the conclusion that, as Agent Lane was not shown to have any express authority to waive the condition requiring proofs of loss, and as no such waiver was written upon or attached to the policies, there was in contemplation of law no waiver at all, unless the defendant company, with full knowledge of the fact that an agent had attempted to waive the condition and of what he had said and done in doing so, ratified his action. No claim of ratification is made except one based on the fact that defendant paid the policy issued May 5, 1907. As proof of loss had been furnished under this policy, and thereby a legal liability had been established, we perceive no reason why the payment of that demand should dispense with a condition precedent to liability or other and dif-

ferent policies. Moreover, as the record is silent concerning knowledge by defendant's general officers concerning anything said or done by the agent, Lane, claimed to constitute a waiver there is and can be no ratification."

In the case of *Missouri Pac. Ry. Co. vs. Western Assur. Co.* 129 Fed. 610, the question arose as to what would constitute the waiver of the proof of loss. The policy required the furnishing of proofs of loss within sixty days after the fire and further that the Company should not have been deemed to have waived proofs of loss within the time required by any proceeding on its part relating to the appraisal or examination of the property insured. It appeared that the company had acknowledged in writing notice of the loss and had commenced and continued negotiations for the settlement of the loss without requiring proofs to be made. In holding that this was not a waiver of the requirement of the policy and that the plaintiff could not recover in the action the court said:

"Such being the conditions imposed upon the assured to furnish 'proofs of loss' to the insurer as found in his contract of insurance, and such being the character of the 'proofs of loss' so required to be furnished, the contract period of 60 days from the date of loss is a reasonable time to enable the assured to comply with the conditions imposed. However, in the event this period of time for any reason proves insufficient, and an extension of time is desired by the insured, the parties to the

contract have expressly stipulated, not that a waiver on the part of the company of the failure of the assured to furnish 'proofs of loss' within the 60 days required by the terms of the contract may not be shown, but, in order that the entire engagement and obligation of the company may rest in writing, and not in the fickle memory of interested parties or witnesses, it is stipulated that such waiver, if any, must rest in a writing to that effect, executed in such manner as will bind the company. That such is the contract existing between the parties there is no room to doubt. That this contract has not been complied with by the assured stands admitted.

"Has non-performance of this condition by assured been waived by defendant? Reference to the adjudicated cases will show not a little 'judicial legislation' on this subject of insurance in many of the states, doubtless occasioned from the hardship or supposed hardship resulting to the assured from an enforcement of the contract of insurance only according to its terms and conditions as found therein written, and by way of avoidance of such supposed injustice to assured. However, the federal Supreme Court has not indulged in this 'judge-made' law, but has uniformly and consistently held that a tract between the parties, to be enforced only according to its provisions, and in the same manner as any other contract in writing"

and again the court says: 129 Fed. 614.

"So, in the case at bar, it is held, the assured not having furnished 'proofs of loss' within the



period of 60 days from the date of the fire, as required by the terms of the policy, it would, in my judgment, be competent for plaintiff to allege and show, if possible to so do, that defendant company, through its duly authorized officers or agents had waived such breach of condition by extending the time for performance in the manner stipulated in the contract—that is, by a writing to that effect—or had in writing waived performance of the condition requiring assured to furnish ‘proofs of loss’ either by denying liability under the contract in advance of ‘proofs of loss,’ thus repudiating its contract on its part, or by in any manner in writing notifying assured that ‘proofs of loss’ would not be required in accordance with the condition imposed in the policy. But such is not the waiver pleaded in the petition. The waiver of the breach of a condition to be performed under the express terms of the contract in this case by assured, precedent to the maintenance of this action for a recovery upon the contract, which the parties have stipulated shall rest in and be evidenced only by writing, is here attempted to be predicated upon acts and conduct of the defendant necessarily resting in parol, and not evidenced by writing.”

In the case of *Modern Woodmen vs. Tevis* 117 Fed. 369: 375, the court said:

“A principal may limit the authority of his agent, and when he does so the agent cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know

the limitations of his power. Insurance companies and beneficial associations may limit the authority of their agents in this way by stipulations in their contract, and when, so limited, such agents cannot by contract, waiver, or estoppel bind their companies to the insured or to the beneficiaries of the agreements beyond the scope of their authority prescribed therein, because the insured and the beneficiaries are conclusively presumed, in the absence of fraud or mistake to know the terms of their contracts."

In the case of *San Francisco Savings Union vs. Western Assurance Company*, 157 Fed. 695, the court held that where the insurance contract contained a condition printed on the back of the policy that no suit could be maintained until after full compliance by the insured with the requirements thereof and among the requirements was one that proof of loss should be made within sixty days after the fire unless such time is extended in writing, where it was shown that proofs of loss were not made until six months after the fire and there was no allegation of extension or waiver the plaintiff could not recover, the court cites with approval the case of *White vs. Home Mutual Ins. Co.* 128 Cal. 131; 135 60 Pac. 666, and quotes from that case as follows:

"The policy by direct words says proof of loss must be furnished within 60 days from the date of the fire. This is the contract between the parties. The period of time provided allows ample

opportunity to do the work, and the provision is a most reasonable one. If this requirement of the contract is binding to any extent, if it is binding upon the insured to furnish the proofs of loss, then why is it not equally binding upon him to furnish proofs within 60 days? Why should one provision of the requirements be given effect, and not the other? It is not for this court to say that the one provision holds any more of substance than the other. It is conceded by the Michigan court in all its cases that the proofs must be furnished before the action can be brought, and it seems equally clear that they should be furnished within the time specified, or likewise action cannot be brought. As the court has already shown, the great weight of authority is in direct line with these views. The contract is that the action cannot be brought until after a full compliance by the insured with all the foregoing requirements. One of these requirements demanded the insured to furnish proofs of loss within 60 days from the date of the fire. At the time this complaint was filed the insured had not complied with this requirement of the contract, and the 60 days had long since gone by."

In the case at bar the fire took place on the 7th of June and the alleged proof of loss was not made out until the 21st of September, 1921, more than three months, 106 days after the fire.

In this connection it is also to be born in mind that the letter which was written to the assured calling upon him to comply with the terms of his policy was dated

August 16, 1921, more than seventy-three (73) days after the fire, and thirty-two (32) days thereafter before Enders attempted to furnish any proof of loss whatever.

Another item to be considered in this connection is that Enders did not at any time from the date of the fire, June 7, 1921, until the 21st of September, 1921, attempt to comply with the terms of his policy with regard to notice of proofs of loss.

The authorities hold that after the sixty (60) days time had expired and the forfeiture by reason thereof has become effectual, no subsequent act or proceeding could constitute an implied waiver.

In the case of *Burlington Inv. Co. vs. Ross* 48 Kan. 288, 29 Pac. 469 it is claimed that the proofs of loss were waived because the defendant denied liability for loss under said policy. The court in holding that in order to make a waiver of this character effectual it must appear that the denial of liability had taken place before the time in which the proofs of loss that were to be furnished by the terms of the policy had expired.

The entire question presented was whether a denial of liability after the sixty days had expired would constitute a waiver of the requirement as to the proofs of loss within (60) days, the court said:

“It is idle to cite authorities to the proposition that, in actions of this character, it is necessary to a recovery that the terms and conditions of the policy with regard to proofs of loss must be shown

to have been substantially complied with, or that such conditions had been waived in some manner recognized by the law as sufficient for that purpose."

In the case of the State Ins. Company vs. School District, 60 Kan. 77, 71 Pac. 272, the proofs of loss under the policy were required to be made within thirty (30) days after the loss. Such proofs were not made within that time and not waived within the time, and the court specifically held that the plaintiff could not recover and the court said:

"After the expiration of more than 30 days the insurance company, in answer to a letter written by the plaintiff, replied that it has canceled the policy before the loss, and therefore was not liable. This was not a waiver of a compliance by the plaintiff with the conditions in the policy under consideration. If the company had made this statement prior to the expiration of the time within which the plaintiff could have made proof of loss, this would have relieved it of the necessity of making such proof. Then proof would have been a useless act. The company would have been estopped to say that proof of loss had not been made. A general denial, however, by the company, after the expiration of the time within which proof of loss might have been made of all liability under the policy, would not estop it from setting up any defense that it might have."

In the case of Beatty vs. Ins. Co. 66 Pa. 9; 17, the



question arose as to the sufficiency and timeliness of proofs of loss made in the case, the court said:

“It was required to be within thirty days after the fire. Now to constitute a waiver, there should be shown some official act, or declaration by the company during the currency of the time dispensing with it; something from which the assured might reasonably infer that the underwriters did not mean to insist upon it. As is remarked by the present chief justice in *Diehl vs. Ins. Co.* 58 Pa. 452, 98. Am. Dec. 302: ‘This never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it.’ Mere silence is not enough. After the thirty days had expired without any statement, nothing but the express agreement of the company could renew or revivify the contract.”

Another point in connection with this waiver is, they claim that by reason of the demand by the adjusters that Enders complied with the terms of his policy.

In the case of *Wheaton vs. North British, etc. Company* (Cal.), 18 Pac. 758, the court held:

That the fact that the insured was required to make proofs of loss under the terms of his policy was not waived by a notification to that effect and that he complied with the terms of his policy and could not be construed as a waiver or plead as an estoppel, the court said as follows:

“In cases like the present it must appear that the insured was misled to his prejudice; and,

where no act has been done or left undone by the insured in reliance on the act or non-action of the insurer, there can be no estoppel. *May, Ins. P507, McCormick vs. Springfield Co. supra.* The acts or declarations must have influenced the conduct of the other party, to his injury. *Biddle Boggs vs. Mining Co., supra.* An estoppel can never arise by implication alone, except by some conduct which induces action in reliance upon it to an extent which renders it fraud to recede from what the party has been induced to expect. *Security Co. vs. Fay, 22 Mich. 467.* An equitable estoppel is only called into existence for the prevention of wrong and redress of injury. There must be some element of wrong in the action of the party creating it. He must know, or have sufficient reason to believe, that another party will place himself in a different position, or subject himself to additional injury, in consequence of the action or representation. The jury were not authorized to find that the plaintiff was 'put to the trouble and expense of making preliminary proofs as to his claim' by the agent's request that he make such proofs. The plaintiff could not have been induced to go to such trouble and expense by the mere waiver of time within which the proofs were to be made, or of the stipulated mode of making them. It was equally his duty to make them, whether the time and mode were waived or not. His action is to be referred to the contract; his motive to the necessity of making the proofs as a preliminary to securing the insurance. After he was requested

to make the proofs he had agreed to make, he made them; but the statement that he was induced to make them by the request is only a post hoc ergo propter hoc."

It has been held likewise by the State Courts, that the proofs of loss in any event a condition precedent to recovery and when the Company has insisted on the defense arising from the forfeiture it cannot be maintained that the insured has been in any manner misled by a demand for a strict compliance with the terms of the policy.

Rundell vs. Hough Anchor etc. Ins. Co. (Iowa) 101 N. W. 517;

Fitzpatrick vs. Hawkeye Ins. Co. 53 Iowa 335; 5 N. W. 151;

McCormick vs. Orient Ins. Co. 86 Cal. 260; 24 Pac. 1003;

Friedman vs. Providence etc. Ins. Co. 175 Pa. 350; 34 Atl. 730;

Armstrong vs. Agricultural etc. Co. 130 N. Y. 560; 29 N. E. 991.

In the case of Armstrong vs. Agricultural etc. Co. (Supra) the court quotes with approval from Devens vs. Inc. Co. 83 N. Y. 168; 173 as follows:

"There must be in addition evidence from which the jury would be justified in finding that with sufficient knowledge of all the facts there was an intent to abandon if not to insist upon the particular defense afterward relied upon and that it was purposely con-

sidered under circumstances calculated to and which actually did mislead the other party to his injury.”

In *Friedman vs. Providence etc. Ins. Co.* (Supra) the court said:

“Waiver is essentially a matter of intention and to show it there must be some declaration or act from which the insured might reasonably infer that the insurer did not mean to insist upon a right which because of a change of position induced thereby it would be inadequate to enforce.”

Citing *Beatty vs. Ins. Co.* 66 Pa. State 9, in *Gibson Electric Co. vs. Ins. Co.* 54 N. E. 23, the court said:

“In the absence of an express waiver at least some of the elements of an estoppel must exist.”

“There is no waiver where there is a stipulation that the act demanded or requested by the insured shall not be considered as a waiver of any forfeiture or defense.”

*Phoenix Ins. Co. vs. Fleming* 65 Ark. 54 44 S. W. 464.

And again:

“An agreement that the investigation should be without prejudice and that the company shall not be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination provided for in the policy prevents a waiver from being pleaded.”

*Keet Roundtree D. & G. Co. vs. Merc. Ins. Co.* 74 S. W. 469, 100 Mo. App. 504.

“The mere sending of an adjuster to determine the amount of loss will not amount to a waiver of a prior forfeiture.

Young vs. St. Paul F. & M. Co. 47 S. E. 681.

Jewel vs. Home Ins. Co. 29 Iowa 562.

Baer vs. Phoenix Ins. Co. 4 Bush (Ky.) 242.

Colonius vs. Hibernian etc. Co. 3 Mo. App. 56.

Burnham vs. Royal Ins. Co. 75 Mo. App. 394.

The acts of an adjuster cannot operate as a waiver when there is an agreement that steps taken to determine the extent of the loss shall not waive any conditions of the policy.

Shawnee Fire Ins. Co. vs. Knerr, 83 Pac. 611, 72 Kan. 385.

Urlaniak vs. Fireman Ins. Co. of Newark, 227 Mass. 132, 116 N. E. 413.

Point Bratnot S. & G. Co. vs. Hartford Fire Ins. Co. 136 N. Y. Supp. 877.

In the case of Phoenix Ins. Co. vs. Lawrence, 4 Metc. (Ky.) 9, it was held: “That a promise to pay on the forfeited policy of insurance was without consideration and void.”

It was held in McCormick vs. Springfield F. & M. Co. 66 Cal. 361, 3 Pac. 617,

“That there can be no estoppel from the preparation of an affidavit by the insured at the request of the insurer.”

Wheaton vs. North British etc. Ins. Co. 76 Cal. 415, 18 Pac. 758.



McConnell vs. Orient Ins. Co. 86 Cal. 260, 24 Pac. 1003.

Freedman vs. Providence Ins. Co. 175 Pa. 350, 34 Atl. 730 (Supra).

In the case of Boruszeeski vs. Ins. Co. 186 Mass. 589; 72 N. E. 250, it was held that:

“Where by the terms of a policy of insurance the payments of loss was to occur after the furnishing of notice and certain proofs thereof the furnishing of such notice and proofs constituted a condition precedent, which in the absence of special rules of pleading must be pleaded and approved by one seeking to recover under the policy.

We have in Montana a decision in the case of Da Rin vs. Casualty Co. 41 Mont. 184, where the court, in speaking of the notice and proofs of loss, said:

“But a mere informal notice does not ordinarily supply the place of formal proof. (O’Reilly vs. Guardian Mut. L. Ins. Co. 60 N. Y. 169; May on Insurance sec. 460; 4 Joyce on Ins. sec. 3285). However the two acts may be done, whether conjunctively or separately, both are conditions precedent which must be complied with in order to render the insurer liable unless there is an express or implied waiver (4 Joyce on Ins. 3286).”

(Tex.) 28 S. W. 133, it was held that:

In the case of Labell vs. Georgia Home Ins. Co.

“There is no waiver when the expenses and trouble incurred by the insured is voluntary rather than induced by the acts or statements of

the Company, and if the policy requires written notice of loss oral notice is insufficient.

Patrick vs. Farmers Ins. Co. 43 N. H. 621, 80 Am. Dec. 197.

Continental Ins. Co. vs. Parks, 142 Ala. 650; 39 So. 204.

Ermentrout vs. Girard F. & M. Co. 63 Minn. 305, 65 N. W. 635.

Scottish Union vs. Clancy, 71 Tex. 5, 8 S. W. 620.

In this case there was no written notice of loss; there was no proof of loss until more than three (3) months after the fire; there was no waiver of proof of loss ever made in the manner required by the policy by any one authorized to make the same under the terms of the policy; there was no implied waiver from any act of the adjusters and no evidence whatever of any requirement on the part of the adjusters of the Company or any act which could be construed as an estoppel within the meaning of that word as defined in the authorities above cited.

The rule is clear and unquestioned that it is for the court to determine whether there is any evidence whatever to sustain a claim of waiver of the essential requirements of the policy with reference to notice and proofs of loss in this connection.

We respectfully submit that no evidence was aduced at the trial nor was there any pleading of facts upon which a claim of waiver under the authorities could be based.

PLAINTIFF SOUGHT TO RECOVER AT LAW UPON A CONTRACT OTHER THAN THE POLICY ATTACHED TO HIS COMPLAINT. THIS HE COULD NOT DO WITHOUT FIRST OBTAINING REFORMATION OF THE CONTRACT IN EQUITY.

Plaintiff specified in his complaint that the contract of insurance did not conform to the actual understanding had between himself and Jackson, the agent of the Insurance Company, with whom he negotiated for the policy. Plaintiff specifies in his complaint as follows:

“That no written application was made by plaintiff herein to the defendant or its agents for the issuance of said insurance policy, but that the plaintiff at the time of the oral negotiations between plaintiff and defendant’s agent for the insuring of the property heretofore described, and before the issuance by defendant of its insurance policy Exhibit ‘A,’ the plaintiff specifically advised and informed the agent of said defendant, one Wm. H. Jackson, Jr., he being the defendant’s agent who issued and delivered said Policy, Exhibit ‘A’ to plaintiff, that the Natural Mineral Water Company had been the original owners of said property and had sold the same to plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it

payable to the Natural Mineral Water Company as their interest might appear and that said agent advised this plaintiff that he understood about the Natural Mineral Water Company and that it was included in the Fred J. Kiesel Estate and that he would annex the clause in proper manner; that in issuing said policy as is shown therein, the said agent by mistake, or inadvertance, the exact reason being unknown to plaintiff, made the loss, if any, on the building, therein insured, payable to the Fred J. Kiesel Estate, mortgagee or trustees, as its interest might appear; 'that the Fred J. Kiesel Estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy had any interest whatever in or to the said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interested in the same.' "

Exhibit "A," attached to the complaint, contained this clause:

"Loss, if any, on building only, subject, however, to all the terms and conditions of this policy, payable to assured and Fred J. Kiesel Estate, mortgagee."

There is also a mortgagee clause with full contribution attached to the policy with full provisions for subrogation in favor of the Company.

The policy also contains a statement of the plaintiff's insurable interest as it was called, as follows:

“That the plaintiff at all times herein mentioned, as the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North Half ( $N\frac{1}{2}$ ) of Lot Four (4) in Block Thirty-Eight(38) in the Village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon, had an insurable interest in a three-story frame building, and the contents thereof, erected and situate on the premises last described, and known as the Idanha Hotel at the time of its insurance and destruction by fire, as hereinafter mentioned.”

In this clause he assumes to be, not the sole and unconditional owner of the property insured nor the owner of the land upon which the building stood in fee-simple but the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation. It is manifest that when the complaint was drawn, plaintiff assumed that he had the right to maintain an action upon the ground that while the actual title to the property was in the Natural Mineral Water Company, a corporation, his interest therein was that he had an option to purchase the same, and a deed in escrow which was to be delivered upon his payment of the purchase price agreed, and that the oral negotiations and statements which he had, proofs of the execution and delivery of the policy, with Jackson, the agent, was sufficient to enable him to introduce parol proof thereof and upon such evidence being adduced, his



right to recover could be maintained. When, however, in the trial of the case he sought to introduce oral testimony of the negotiations previously had and which he had plead with Jackson, the agent, the well-known principle announced by the Supreme Court of the United States in the cases previously cited in this brief being invoked, no proof of that kind was permitted by the Court, and as he did not in his complaint show any sole or unconditional ownership in the building, subject to the insurance, or any fee-simple title to the land upon which the building stood, his cause of action, based upon the policy as it was written, entirely failed. He made no effort to have the policy reformed to correspond with the allegations of the agreement as set forth in his complaint. Under these circumstances it was impossible for him to recover.

In the case of *Phoenix Ins. Co. vs. Wilcox etc. Co.* 65 Fed. 724, the Circuit Court of Appeals for the Fourth Circuit, said:

“That if the policy fails to express the contract and cannot be construed in accordance with the contention of the complainant, a court of equity was the only jurisdiction in which the policy could be reformed and corrected.”

In the case of *Ins. Co. vs. Morey* 96 U. S. 544, 24; 674, the Court held:

“That in as much as all previous verbal arrangements were merged into written agreements that that if by inadvertance or mistake provisions

other than those intended were inserted, or stipulated provisions were omitted, the parties could have recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the Insurance Company."

In the case of *Lumber Underwriters vs. Rife* 237 U. S. 608, 59; 1143, the court said:

"Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause."

See also *Vermillion M. & Co. Co. vs. Norwich et Ins. Society*, 146 Fed. 701; *Hammell vs. Queen Ins. Co.*, 50 Wis. 290, 6 N. W. 805.

That the policy of insurance as issued by the defendant Company, upon which the plaintiff sought to recover did not conform in the respects named to the contract which plaintiff alleges he made with the agent, Jackson. The loss, if any, under the terms of the policy is made payable to assured and Fred J. Kiesel Estate, Mortgagee. It is to be observed that the policy

itself contains no provision that the loss is to be paid to Fred J. Kiesel Estate, mortgagee, as its interest might appear, but it is made payable directly to the assured and Fred J. Kiesel Estate. The mortgagee clause with full contribution contains the words, "as interest may appear," but the policy itself contains no such restriction. The title of the property, according to the allegations of the complaint, was in the Natural Mineral Water Company.

The deed in escrow had never been delivered. The title of the plaintiff was that of a vendee under an executory contract of purchase, evidenced by a deed in escrow. The plaintiff was not the sole and unconditional owner of the building, the subject of insurance.

He was not the owner in fee-simple of the land upon which the building stood. By the terms of the policy of insurance it became void if he was not the sole and unconditional owner of the building, and if he was not the owner in fee-simple of the land upon which the building stood.

When he failed to ask for a reformation of the contract in equity and to have the policy reformed to correspond with the terms of the agreement as he sets forth that he had with the Agent Jackson, he failed to show a cause of action upon which he could recover at all, and the refusal of the court to sustain the objection of defendant at the opening of the trial of the introduction of any evidence whatever was error.

## II.

THE INTEREST OF THE ASSURED IN THE PROPERTY WAS NOT TRULY STATED THEREIN IN AS MUCH AS HE WAS NOT THE SOLE AND UNCONDITIONAL OWNER THEREOF AND DID NOT OWN THE LAND UPON WHICH THE BUILDING, THE SUBJECT OF INSURANCE STOOD, IN FEE-SIMPLE.

That at all the times in said complaint mentioned as vendee of an executory contract entered into by plaintiff and Natural Mineral Water Company, a corporation, for the purchase of lots described, plaintiff had an insurable interest in a three-story frame building and the contents thereof, erected and situate on the premises last described and known as the Idanha Hotel at the time of its insurance and destruction by fire.

In paragraph 4 of the complaint, plaintiff set forth that the Natural Mineral Water Company had been the original owners of said property and had sold the same to plaintiff and placed a deed thereto in escrow in Soda Springs Bank with instructions to said bank that "when purchase price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company, "as their interest might appear."

The policy contained the following condition:

“This entire policy shall be void if the interest of the insured in the property be not truly stated herein.”

And again the policy provided:

“This entire policy shall be void if the interest of the insured be other than unconditional and sole ownership or if the subject of insurance be a building on ground not owned by insured in fee-simple.”

By the other allegations of his complaint plaintiff has put himself entirely out of court. He must recover upon the allegations of his complaint or not at all. In his complaint he has specified that as vendee of an executory contract with Natural Mineral Water Company, a corporation, he had an insurable interest in the building, subject of the insurance. This interest, he explains in paragraph 4, to be an agreement between Natural Mineral Water Company and himself, whereby the Natural Mineral Water Company had placed a deed in escrow in Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff would receive the deed.

At the trial of the case plaintiff sought to introduce evidence of the oral negotiations between himself and Agent Jackson with reference to the specifications of his title and interest in the property to be contained in the policy, but when this evidence was rejected by the court, plaintiff without in any manner seeking to



reform the policy, or in any way attempting to introduce evidence of the deed and the escrow agreement.

Witness Torgerson testified that Exhibit "4," the deed and Exhibit "5," the letter from Heslet to Enders, and Exhibit "6," the letter from Heslet to the Bank of Soda Springs constituted all of the directions received by the bank relative to this deed. His testimony is as follows:

"All the instructions that I have from the party that submitted the deed to me was in writing, but I received other instructions later from Mr. Enders, in connection with the deed."

Torgerson further testified as follows:

THE COURT: Did you have any other instructions in writing, than such as are contained in these two letters that have been offered in evidence?

A. No, sir.

He says: "Mr. Enders told me after my asking him when they were going to inspect that deed so that I could return it to the bank at Butte, he says Mr. Clark had told him to leave the deed there and I never received any subsequent instructions from the bank at Butte, so I figured it was all right to hold the deed." (Record page 228).

This is all the testimony with reference to the alleged escrow agreement.

A quit claim deed signed Natural Mineral Water Company, by W. A. Clark, its president, is sent to the

bank at Soda Springs with instructions to submit the same to Enders' attorney for their instruction and return to the bank. Enders is informed that when he pays four thousand (\$4000.00) in full, the deed is to be delivered to him. Later Enders informs Torgerson, the cashier, that the deed is to be left in the bank and not returned to the bank in Butte.

The deed was never delivered to Enders. The four thousand (\$4000.00) dollars was never paid. Enders in his testimony states that the only interest in the property was that he had an option to purchase the same.

His testimony in this respect is as follows:

Q. That was the first conversation. He said the deed might remain there at Soda Springs in the bank, is that right?

A. Yes, sir.

Q. That is, you were to have that deed of that property if and when you paid \$4,000, is that correct?

A. Yes, sir.

Q. And until you paid that \$4,000 the deed was not to be delivered to you?

A. Yes, sir.

Q. You never paid that \$4,000?

A. Not yet.

Q. What?

A. Not yet.

Q. No.

A. The deed is still there.

Q. The deed is still there. It never has been delivered to you?

A. Yes.

Q. You had the option to purchase that property for \$4,000, didn't you?

A. Yes, sir.

Q. And you have never exercised that option, have you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. When?

A. By paying the interest on it and they give me six years' time to pay it in.

Q. I didn't hear.

A. I have got plenty of time to pay it in.

Q. You had, you say, six years to pay it in?

A. Yes, sir.

Q. Then that agreement was that you were to have six years to take up that deed?

A. Yes, sir.

Q. You had an option running over a period of six years?

A. Yes, sir.

Q. That is all there is to it, isn't it?

A. Yes, sir.

Q. Now, when did that six years run from?

A. How is that?

Q. When did that six years run from?

A. From the first of February, 1918.

This testimony of Enders clearly fixes the fact that he was never at any time sole or unconditional owner

of this property, or of the building the subject of the insurance; that he never had any title in fee-simple to the same; that the only interest that he had was that of an option to purchase and taking the allegations of his complaint with reference to his interest it is clear that there was never any legitimate claim on his part that his title to the property was other than that of a vendee under an option to purchase.

He had entirely mistaken the grounds upon which he must recover if he recover at all. He had assumed that the proof of the preliminary negotiations with the Agent Jackson, would be admitted in evidence and that the Company would be bound by the knowledge of the agent, and that he could recover upon the testimony of these negotiations, but when this proof was rejected he attempted to claim that he had bought the property, that it was his, and that his title to the same was complete, notwithstanding the facts as presented in the documents offered in evidence.

In the case of *Phoenix Ins. Co. vs. Kerr*, 129, Fed. 727: It appeared that the plaintiff had given an option to purchase the property to a certain firm, they had paid a certain amount on the option, but they had not agreed to complete their acceptance of buying the property, and they were not bound to take or pay for it.

The question was whether the plaintiff who had given the option was the sole and unconditional owner of the property, or whether the vendee who had taken the option was such. The court said:

"But if the owner gives to another the option to purchase a piece of property, and the latter does not irrevocably accept the offer and definitely agrees to make the purchase, the loss or its injury or destruction falls upon the owner of the property, and not upon the owner of the option, because the latter is not bound to take or pay for the property, and he cannot be compelled to do so. And while the owner of the option may accept it, and compel the owner of the property to comply with its terms, until the owner of the option does so, he has no interest in the property. He has nothing but a mere right to acquire an interest in the property which impinges upon its unconditional ownership by him who gave the option.

"The result is that the owner of the property who has given an irrevocable option to purchase it to one who has not agreed to accept the option or to pay for the property still has the unconditional ownership of it within the proper interpretation of the clause upon that subject in policies of insurance and he may maintain an action upon a policy for injury to it by fire."

In the case of *Richardson vs. Hardwich*, 106 U. S. 252, 27; 145, the court, in holding that the owner of an option to purchase was not the owner of the property, said:

"The written contract gives him the privilege, or, as counsel call it, an 'option,' to become equally interested in the lands by paying one-half the purchase money, etc., written two years after its date.



The contract, of itself, did not vest him with any interest or estate in the lands, it merely pointed out the mode in which he might acquire an interest, namely: By paying a certain sum of money within a certain time. He did not pay the money within the time limited by the contract, and has never paid it or any part of it, and eighteen months before the commencement of this suit, Hardwich gave him notice that his option to purchase had been lost, and told him that he had no interest in the lands. It is clear from the terms of the contract that Richardson was not bound by it. He did not agree to purchase any share in the lands or to pay Hardwich any money. The contract gave Hardwich no cause of action against Richardson. The latter was not bound to become interested in the lands or to pay any money thereon, unless he chose to do so."

There is nothing in the testimony in this case which will warrant the conclusion that the plaintiff ever at any time agreed or bound himself irrevocably to pay the purchase price for this property and in this connection it is pertinent to call the court's attention to the following:

Enders had some conversation with W. A. Clark and with Mr. Shearman, but there is no evidence whatever that the Natural Mineral Water Company, a corporation, ever authorized or empowered its officers to sell the property in question to Enders upon any terms whatever, except that the deed was executed in the

name of the Natural Mineral Water Company, by W. A. Clark, president, and delivered to the bank in Soda Springs, accompanied by a letter authorizing the bank to deliver the deed to Enders upon the payment of the full sum of \$4,000, but at a date prior to the execution of the deed and the letter and the delivery of the same to the bank he had paid \$240.00 of interest upon the amount. He states that he had six (6) years within which to make the payment from the year 1918, but that he never agreed specifically in any binding manner upon himself to pay the \$4,000; the price agreed upon is not in evidence at all. His possession of the property was merely that of lessee under an option to purchase, but Enders in his sworn statement specified that he had a contract in escrow agreement from the Kiesel Estate and Ex-Senator Clark. (Record p. 281).

The escrow agreement, as it is called, that is the deed and the letters accompanying the same, were dated May 11 and June 14.

Enders paid \$240.00, which he alleges was interest, more than a year prior to this time, so that whatever agreement he had with Kiesel Estate and Ex-Senator Clark was entirely separate and distinct from the escrow agreement, if it can be so called, named with Natural Mineral Water Company if there was any agreement with the Natural Mineral Water Company.

Enders further states in said sworn statement that the Kiesel Estate has and holds an interest in said property as security in the sum of about \$5,400. (Record page 281).

Another fact of importance is that there is nothing in evidence in the record whatever to show what, if any interest, Kiesel or the Kiesel Estate had in the Natural Mineral Water Company. There is no evidence whatever to show what interest Ex-Senator Clark had.

There is no evidence in the record or anything to show that the Natural Mineral Water Company, acting through its board of directors or any of its authorized officers, ever negotiated with Enders for the sale of this property except the deed and the letters written by Heslet, marked Exhibits "5" and "6" nor is there anything in the record to show that Enders in any way was bound to Natural Mineral Water Company by an irrevocable contract or any contract to pay the purchase price.

Under this condition there was no testimony whatever to go to the jury upon the question of the right of Enders to claim title to the property as the sole and unconditional owner thereof.

In the case of *Hunt vs. Springfield F. & M. Co.* 169 U. S. 47, 49; 381.

The question in that case was whether a condition in the policy of fire insurance for the unconditional and sole ownership of the property by the insured and for the non-existence of any chattel mortgage thereon was broken where certain trust deeds of the property had been executed.

The court, in holding that the condition was broken and the policy void, said:

"The provision in the policy is one for the protection of the insurer, who is entitled, if he insists upon it in his questions, to be apprised of any fact which qualifies or limits the interest of the insured in the property, and would naturally tend to diminish the precaution by fire."

In the case of *Walter vs. Northern Assurance Company* 10 Fed. 232, the court in passing upon a similar provision in the policy with regard to the duty of the assured to disclose his interest, and that the policy was void if his interest were other than sole and unconditional, he said:

"That it is the duty of the party applying for insurance to disclose the nature of his interest in the property to be insured and such provisions must be upheld and enforced not simply on the ground that it is a warranty and therefore to be enforced independently upon its materiality, but upon the ground that it calls for disclosure of material facts."

In the case of *Ins. Co. vs. Lawrence*, 2 Peters 25, the Supreme Court in passing upon this question said:

"The contract for insurance is one in which the underwriters generally act on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material for the underwriters to know. It may not be necessary that the person requiring insurance should state every incumbrance on his prop-

erty, which it might be required of him to state if it were offered for sale; but fair dealing requires that he should state everything which might influence, and probably would influence the mind of the underwriter in forming or declining the contract. A building held under a lease for years about to expire, might be generally spoken of as the building of the tenant; but no underwriter would be willing to insure it as if it was his; and an offer for insurance, stating it to belong to him, would be a gross imposition.

Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss."

That the interest of the assured or the policy is void has long been maintained by the courts of the States.

McCormick vs. Springfield etc. Co. 66 Cal. 361.

McWilliams vs. Cascade etc. Co. 7 Wash. 48; 34 Pac. 140.

Lasher vs. St. Joseph etc. Co. 86 N. Y. 423.



In the case of *McWilliams vs. Cascade etc. Co.*, it was held that "The fact that one of the insured articles was held merely under a contract of sale with the title outstanding in the seller invalidated the whole policy."

In the case of *Rochester, etc. Co. vs. Schmidt*, 162, Fed. 447.

Certain policies contain a clause that they should be void if the interest of the insured was other than "unconditional and sole ownership," or if the subject of insurance was a building on ground not owned by the insured in fee simple.

Title to the land in question had been transferred to the insurer's wife and she dying intestate title descended one-third to the insured and two-thirds to his daughters. The insured had always treated the property as his own, having bought and paid for it originally; he paid taxes, built and controlled houses thereon, collected rents and at his own cost had placed on the property the building and machinery destroyed. He made no written application for the insurance and no representation with regard to the title of the land, the court held:

"That the policies were void for want of unconditional and sole ownership in the insured."

The court says:

"Does that, even though Frederick Schmidt had originally paid for the property, the title to which was conveyed to his wife, and even though he had

always paid the taxes on it, and paid for the improvements he erected on it, gratifying the express condition of the policy that he was the unconditional and sole owner, that he owned the ground in fee simple?"

We think that the weight of authority is that, when a policy contains this language, it is made an express condition of the validity of the policy.

In 2 Clement on Ins. p. 152, it is said:

"An insured ownership is sole when no one else had an interest in the property as owners and is unconditional when the quality of the estate is not limited or affected by any condition."

In 1 May on Insurance § 287, it is stated:

"A condition that, if the insured is not the sole, entire and unconditional owner, the policy shall be void, is reasonable and valid, and failure to disclose the real state of the title, if not sole etc., will be fatal, although the insured was not questioned as to that fact."

Schrodel vs. Humboldt Fire Ins. Co. 158 Pa. 459, 27 Atl. 1077, was a case arising upon a similarly worded condition in a policy issued to John Schrodel. The court said:

"The unconditional evidence was that the title to the property was in the plaintiff and his wife jointly. This in the absence of any proof of fraud or mistake as to the insertion of the stipulation above quoted was a flat bar to the plaintiff's recovery."

See also 13 A & E Encyclopaedia of Law (2d Ed) 233.

In *Hartford Fire Ins. Co. vs. Keating* 86 Md. 130-145, 38 Atl. 29; 31; 63 Am. St. Rep. 499, it is said:

“To be unconditional and sole, the interest must be vested in the insured, not contingent or conditional, nor for years or life, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable.”

*Perry vs. London Assur. Co.* 167 Fed. 905.

In the case of *Syndicate Ins. Co. vs. Cohn* 65 Fed. 165: The sole stockholders of a corporation brought suit upon policies issued to themselves as owners, upon the property owned by the corporation. The Court in holding that the provision of the policy as to sole and unconditional ownership and that the interest of the insured must be truly stated, furnished a complete defense, said:

“The policies themselves, containing, as they did, the contracts that they should be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if it was not the sole and unconditional owner, and a description of it was not indorsed on the policy, were pointed inquiries of the assured whether their interest was the sole and unconditional ownership of the property described,

and their silence and acceptance of the policies was the answer. The policies themselves were notice to the Bohns that the companies deemed their interest that of unconditional ownership, that they insured them against loss of that interest only, and that they expressly excluded every other interest from the insurance unless the Bohns immediately notified them that they held a different interest, and caused a true description of it to be written into or indorsed upon the policies. The silent acceptance of the policies by the Bohns closed these contracts, and bound them to the agreement tendered by the policies, that every interest of theirs but that of unconditional ownership was excluded from the promised indemnity."

The general rule is that if the title is to remain in the seller until the entire purchase price is paid, the purchaser is not the sole and unconditional owner while a portion remains unpaid and a policy so describing him is void by such statement.

Hartford Ins. Co. vs. Enoch, 72 Ark. 47, 77 S. W. 899.

Daw vs Nat'l Ins. Co. 26 R. I. 379 58 Atl. 999

Westchester vs Weaver 70 Md. 536 17 Atl. 401

This being an action at law upon a written contract in Federal Court oral testimony cannot be admitted to vary the terms of the written contract. The oral negotiations with the agent prior to the issuance of the policy cannot be permitted to be introduced in evidence. This principle is so thoroughly established by the de-

cisions of the Supreme Court which we have cited heretofore in this brief that it is not necessary to again refer to them.

It is the duty of the plaintiff to truly state and have written in the policy the nature of his interest and title and his failure to do so cannot be permitted to be shown in an action on the policy after the loss.

When the plaintiff procured the policy of insurance he must have stated clearly the nature of his title and interest, that title is conclusively presumed in the absence of any statement in the policy to the contrary to have been sole and unconditional ownership upon ground owned by him in fee simple. He cannot be heard to claim that the policy did not state truly the facts.

It is idle for the plaintiff to assert that he had a fee simple title to the land in question. He had no title to the land in question. He had no title to the land in fact. The only evidence that could possibly be adduced of a fee simple title in the land was a deed from the owner of the land to him and that deed was in escrow as he claims and was never delivered.

In U. S. vs Hyde 132 Fed 545, the Court said:

“But one cannot truthfully assert that he is the owner of land in fee simple when he knows there is outstanding in another a superior equitable title thereto. Ownership in fee simple implies something more than being the holder of the naked title to the land. It implies an indefeasible legal



title—the entire title and estate in land—or, as it is sometimes defined, ‘An estate in fee simple is the greatest estate or interest which a person can possess in land property.’ ”

In the case of *Parker vs. Conrad* (Kans.) 85 Pac. 810, the court defines fee simple as follows:

“The petition stated that the plaintiff was in actual possession and was the owner in ‘fee simple.’ ‘Fee simple’ or ‘fee simple’ absolute are equivalent terms and well-defined legal expressions. An estate in ‘fee simple’ is the greatest that one can possess.”

The effort on the part of the plaintiff to evade the requirement as to title in fee simple of the land by claiming that he was the purchaser of the land in an irrevocable contract whereby he was bound to pay for the same failed because neither by his pleadings nor by evidence did he establish in any way such a contract.

The Court therefore erred in holding that there was sufficient evidence to go to the jury that Enders was the sole and unconditional owner of the building, the subject of the insurance, that he was the owner in fee simple of the land upon which the building stood, and that the allegations of his pleadings constituted no bar to the right of recovery.

## III.

THE MISREPRESENTATION BY ENDERS AS TO THE CONDITION OF HIS TITLE AS TO THE NATURE AND CHARACTER OF THE INCUMBRANCES THEREON, AND AS TO THE AMOUNT OR VALUE OF HIS LOSS, VOIDED THE POLICY AND PRECLUDED A RECOVERY THEREON.

In the policy, loss, if any, is made payable to Fred J. Kiesel Estate, mortgagee, and assured.

In the mortgagee clause the loss, if any, on the buildings only is payable to Fred J. Kiesel Estate, mortgagee, or trustee, as interest may appear. This clause contains a provision for subrogation.

Enders in his complaint in paragraph 4, says:

“That the Fred J. Kiesel Estate was not the mortgagee or trustee of said property at the time, and did not at the time, nor has not at any time since the issuing of said policy had any interest whatever in or to said assured property, and that the proceeds due under said policy are due and payable to the plaintiff who is the only party in interest in the same.”

In the sworn statement which he made on September 20, 1921, he states: that the Fred K. Kiesel Estate has and holds an interest in said property as security in the sum of about \$5400. In his testimony

at the trial upon being interrogated as to, he makes the following statement:

Q. I say is that true or is it not, that statement that the Fred J. Kiesel Estate has an interest as security in that property to the extent of \$5400, is that true or not?

A. It is not.

Q. It is not true?

A. No.

He states further in his affidavit that he was the owner of said building and the land on which the same stood under contract in Escrow Agreement from the Fred J. Kiesel Estate and Ex-Senator Clark. Enders testifies as follows:

Q. Now in the affidavit of your proof of loss, which you have identified and which is marked exhibit 16, you make this statement: "That the Kiesel Estate has and holds an interest in said property as security in the sum of about \$5400."

A. That should read, the Natural Mineral Water Company. That is an error of Melvin the attorney.

Q. Then this is not true?

A. It should read Natural Mineral Water Company.

Q. I say, is that true or is it not, that statement that the Kiesel Estate has an interest as security in that property to the extent of \$5400, is that true or not?

A. It is not.

Q. It is not true?

A. No.

And again Enders says:

Q. Now going on to another proposition. The title to this property was in the Natural Mineral Water Company, was it?

A. It is in my name.

Q. I say it was in the Natural Mineral Water Company.

A. Yes, sir.

Q. And the only interest which you had is by virtue of that agreement with reference to that deed?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

His complaint was sworn to by Enders in May, 1922. The affidavit referred to was sworn to the 21st of September, 1921. The fire occurred June 7th, 1921. The policy of insurance was issued April 27, 1921.

In his testimony when asked as to certain indebtedness he stated that he had borrowed money from Sherman representing the Kiesel Estate and that his correspondence related thereto. Shearman stated that Enders never had any indebtedness to the Kiesel Estate, and did not owe it any money.

Enders also swore in the said statement referred to that the cash value of the hotel building was \$25,000 and the highest valuation placed upon the building, the

subject of insurance by any witness that he produced was not to exceed \$15,000 and it appeared that Enders had the property assessed for taxes at a valuation of not to exceed \$2000.

The policy attached to the complaint contains this clause:

“This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof: or if the interest of the insured in the property be not truly state herein: or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.”

His admissions that the statement as to the Kiesel Estate and the indebtedness owing to it were untrue; his statement that he purchased the property from the Kiesel Estate and W. A. Clark was untrue; his statement as to the cash value of the property at the time of the fire was untrue; his statement that the Kiesel Estate was never at any time a mortgagee or trustee in any amount not withstanding the terms of the policy and his statement that he was the owner of the property and of the ground upon which the same stood in view of the fact that the only evidence that he had thereof was the agreement and deed referred to as the Escrow Agreement and did clearly bring him within the terms and conditions of the policy quoted above and precluded a recovery on his part.



In the case of *Claflin vs Ins. Co.* 110 U. S. 81 28:76  
 The question presented was whether false answers made by the insured in an examination under oath pursuant to the terms of the policy would prevent a recovery under a provision of the policy similar to the one under consideration and in holding that the insured had no right of recovery by reason of said false answers the court said:

“It is quite obvious that upon the issues, as made in the pleadings and actually tried, it was material to show what title and interest Murphy had at the time of the loss in the property insured. If he had no insurable interest that certainly would have been a defense.\*\*\*\*\*A false answer as to any matter of fact, material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false and wilfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law consists in their tendency to influence the conduct of the party who has an interest in them,

and to whom they are addressed. 'Fraud,' said Mr. Justice Catron in *Lord vs Goddard*, 13 How., 198, 'means an intention to deceive.' "

"When one," said Shepley Ch. J., in *Hammett vs. Emerson*, 27 Me. 308; 326, "has made a false representation knowing it to be false, the law infers that he did so with an intention to deceive." "If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud and fraud in law."

Statements in proof of loss made by the assured are evidence of the facts stated therein against the insured and on behalf of the Company.

In the case of *Ins. Company vs Newton* 22 Wallace 32 p. 795 the court said:

"There are many cases which hold that where a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished the insurers before the trial, the insured will not be allowed on the trial to show that the facts were different from those stated. The case of *Campbell vs Ins. Co.* 10 Allen 312, decided by the Superior Court of the City of New York, and the case of *Irving vs. Ins. Co.* 1 Bosw. 507, are both to this effect. It is not necessary, however, to maintain any doctrine as strict as this in the present case; and possibly the rule there laid down is properly applicable only where the insurers have been prejudiced in their defense by relying upon the statements contained in the proofs. Be that as

as it may, all that we now hold is that the preliminary proofs are admissable as prima facie evidence of the facts stated therein against the insured and on behalf of the Company."

Two cases referred to by the Supreme Court, namely the case of Compbell vs Ins. Co. 10 Allen 213, and the case of Irving vs Ins. Co 1 Bosw 507 holds specifically that the insured in the trial introduced evidence to contradict a statement in the proof, which if true would forfeit the poily. In the Campbell case the Supreme Court of Mass. held that in as much as the proofs of loss contained false statements that this rendered the proofs insufficient as proofs and therefore the insured was placed in this position. If the proofs were true he could not recover because the policy itself was rendered void by the fact set forth; that if they were not true he could not recover because he had furnished no proofs of loss.

These cases have been referred to by the Supreme Court of the U. S. with approval although the court in the Newton case did not adopt the conclusions in their entirety are entitled to great weight in this court.

Enders in his statement states that the Kiesel Estate has and holds an interest in said property as security in the sum of \$5,400 and that his title to the property was under contract and escrow agreement from the Kisel Estate and Ex-Senator Clark. If that statement is true, and the Kiesel Estate have and hold an interest

in the property then he was not the sole and unconditional owner thereof and the policy was void, and if it is true that he had a contract for the purchase of the property under the escrow agreement attempted to be proved at the trial, then he was not the sole and unconditional owner of the property.

The only explanation that he makes of this or attempted to make of it, is that the Natural Mineral Water Company should have been named instead of the Kiesel Estate and if Natural Mineral Water Company had an interest in the property then equally there was no sole and unconditional ownership in Enders and the case becomes directly within the ruling of the Supreme Court of Massachusetts in the Campbell case "That if the statements in the proof of loss were true then the plaintiff could not recover because the policy was void thereby, and if they were not true then there was no proof of loss as required by the policy and the plaintiff could not recover."

Another item of importance in this connection is that the policy as issued, made the loss, if any, payable on the building alone to the Kiesel Estate mortgagee or trustee.

There is a subrogation provision in the mortgage clause attached to the policy by which the right of the insurer to be subrogated to the interest of the mortgagee upon payment of the amount of the mortgage, incumbrances as provided for, therefore the Kiesel Estate held an interest in the property to the extent

of \$5,400 as set forth. If this statement is true then the Company upon paying the amount of the incumbrance held by the Kiesel Estate would be subrogated to the right of the Kiesel Estate as mortgagee and could enforce the claim, if any, against Enders.

The importance of this subrogation right to the insurer is clear and the effect of the taking away from the insurer its right of subrogation is an important and material detriment to the insurer.

In the case of *Carpenter vs Washington Ins. Co.* 16 Peters 495 10:44 the court said:

“No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then, upon such payment, the underwriters are entitled to an assignment of the debt from the



mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances, for the payment of the insurance by the underwriters does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor."

In *Perry vs London Assurance Corporation* 167 Fed 902, the court held: that the "plaintiff by the existence of the policy assented to all the conditions therein expressed, that the defendant company is entitled to stand upon the terms of the contract as written and that fraud and false swearing on his part with regard to his title or ownership of the property and with regard to the incumbrances thereon avoided the policy and held further that notwithstanding the fact that there were two items of insurance specified in the policy that fraud and false swearing in connection with one item rendered the entire policy void, whereas in this case the policy covered a building and its contents.

See also *Fried Breslin Co.* 154 Fed 35

*Gaurberg vs. Western Assur. Co.* 150 Cal. 510,  
89 Pac. 130.

In the case of *Rochester German vs Schmidt* 162 Fed 447 (already referred to) it was distinctly held that misrepresentation and concealment will invalidate the policy containing provisions like the one under consideration although not made with knowledge of the falsity or with intent to deceive. Again it has been

held that it is a general rule that where policies contain conditions intended to secure the insurer, the right to subrogation is where they cover the mortgagee's interest and provide that in case of loss the insurer shall be subrogated to the mortgagee's rights against the mortgaged property on the part of the insurer which impairs or defects the insurer's rights under these conditions, forfeits the policy.

Sussex County Mutual Ins. Co. vs 26 N. J. law  
541

Phoenix Ins. Co. vs Parsons 129 N. Y. 86  
28 N. E. 87

Ins. Co. of N. A. vs Easton 73 Fed 167 11 S. W.  
180

In *Carstairs vs Ins. Co.* 18 Fed 473 it was held "that where a shipper upon a railroad had in the Bill of Lading exonerated the railroad from liability that he could not recover upon a policy of insurance wherein the insurer was given the right of subrogation for the reason that by the very terms of the Bill of Lading which he entered into he had defeated the right of the insurer to recover against the Railroad Company.

In the case of *Hall vs Railroad Company* 13 Wallace 367 p 596 the court said:

"Standing thus, as the insured does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he had in-

demnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."

These authorities clearly establish that when Enders obtained a policy of insurance payable to a mortgagee or trustee, as his interest might, appear, and subsequently in his proof of loss specified that there was an interest in the mortgagee to the extent of \$5,400 and a subrogation was provided for in the endorsement attached to the policy, and then denied that there was any sum due from the Kiesel Estate or any other corporation or person, he deprived the insurer of a substantial right and the policy itself was avoided by reason of the fact that he had impaired the ultimate security upon which the insurer had a right to depend.

The court erred in permitting evidence to be introduced over the objection of the defendant to counteract the effect of these false statements, misrepresentations, and concealments on the part of Enders and in submitting to the jury the right of the plaintiff to recover at all.

## IV.

THE EXISTENCE OF A COMMERCIAL LAUNDRY UPON THE PREMISES WAS A VIOLATION OF THE OCCUPATION WARRANTY CONTAINED IN THE POLICY AND RENDERED THE POLICY VOID.

The policy contained this provision: "On the three-story shingle roof frame building and its contents \*\*\*\*\* only while occupied for hotel and apartment purposes."

Enders in his sworn statement (Record page 282) says, that the kitchen thereof was used and occupied by Mrs. Hart as a laundry.

In his testimony he says as follows:

Q. Mr. Enders, at the time of the fire you speak of the occupancy of the building and I understood you to say that there was a laundry occupying five rooms of the building.

A. Yes, sir.

Q. Was that in the basement?

A. No, sir, that was on the first floor.

Q. It was on the first floor?

A. Yes, sir, and the building was joined on to the main building.

Q. What kind of a laundry was that?

A. Where they wash clothes.

Q. Commercial laundry?

A. Yes, sir.

Q. Steam?

A. Well, they used hot water more than steam.

Q. A regular commercial laundry?

A. Yes.

Q. How long had that laundry been in that building?

A. For about two years, or two and a half years.

Q. And it was there before the insurance policy was issued, these policies?

A. Yes, sir.

Q. And was there at the time of the fire?

A. Yes, sir.

Q. Who was the owner of that laundry?

A. Hart is his name.

Q. And he did laundry work for other people around the town?

A. Yes, sir.

Q. The same as any regular laundry?

A. Yes, sir.

In the case of Connecticut Fire Ins. Co. vs. Buchanan 141 Fed 877, the court in discussing a provision similar to that under consideration said:

“Counsel for the insured neither concede nor controvert the conclusion last stated, but make this contention: The condition of the building when the fire occurred was the same as when the policies were issued. The recording agent issued the policies with full knowledge of the condition, and his knowledge was the knowledge of the insurers.”



And again:

“The question for decision is this: When the parties to written policies of insurance have in plain and unambiguous terms declared it to be their intention that the insurance shall cover a described building while it is used and occupied as a normal school and dwelling, and shall be inoperative if and when the building is not so used or occupied, may it be shown by oral testimony there being no charge of fraud or mutual mistake in reducing the agreement to writing, and the actions upon the policies being at law, that it was in fact the intention of the parties that the insurance should cover the building when not so used or occupied within the meaning of the policies?”

The court going into an exhaustive discussion of the authorities upon the subject of holding that the language of the policy is specified and must govern, in conclusion said as follows:

“The decisions cited exhaust the argument upon the subject. Nothing could be added to what they contain. Because of the error in admitting parole testimony which enable the insured to recover on policies different from those which the parties had made for themselves and because of the error in refusing to direct verdicts for the defendants upon the evidence properly admitted, the judgments are reversed with directions to grant a new trial in both cases.”

The court therefore erred in submitting to the jury the right of Enders to recover in the case where it was specifically admitted that there was a commercial laundry in the building and by the terms of the policy the insurance became and was void in consequence thereof.

THEREFORE, we respectfully ask the court that the judgment of the court below be reversed.

Respectfully submitted,

GEORGE J. SHELTON,

FINIS BENTLEY,

HOWARD TOOLE,

BRICE TOOLE,

*Counsel for Plaintiffs in Error.*

No. 4008

---

IN THE <sup>2</sup>

# United States Circuit Court of Appeals

For the Ninth Circuit

---

ALLIANCE INSURANCE COMPANY, BRITISH  
& FEDERAL FIRE UNDERWRITERS OF  
THE NORWICH UNION FIRE INSURANCE  
SOCIETY, COMMERCIAL UNION ASSUR-  
ANCE COMPANY, LIMITED, and STAR IN-  
SURANCE COMPANY OF AMERICA,  
Corporations,

*Plaintiffs in Error,*

vs.

THEODORE ENDERS,

*Defendant in Error.*

---

BRIEF FOR DEFENDANTS IN ERROR.

---

B. W. DAVIS,  
D. W. STANDROD,  
T. D. JONES,

*Counsel for Defendant in Error.*

---



No. 4008

---

IN THE  
**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

---

ALLIANCE INSURANCE COMPANY, BRITISH  
& FEDERAL FIRE UNDERWRITERS OF  
THE NORWICH UNION FIRE INSURANCE  
SOCIETY, COMMERCIAL UNION ASSUR-  
ANCE COMPANY, LIMITED, and STAR IN-  
SURANCE COMPANY OF AMERICA,  
Corporations,

*Plaintiffs in Error,*

VS.

THEODORE ENDERS,

*Defendant in Error.*

---

**BRIEF FOR DEFENDANTS IN ERROR.**

---

B. W. DAVIS,  
D. W. STANDROD,  
T. D. JONES,

*Counsel for Defendant in Error.*

---

**STATEMENT OF THE CASE.**

As plaintiffs in error have substantially stated in their brief the issues presented by the pleadings, we deem it unnecessary to reiterate herein the ultimate



facts pleaded. The record discloses that judgment was made and entered on each of the verdicts in the sum of \$3500.00 and that thereafter upon petition for a new trial being filed and presented to the trial court, the said trial court, after considering said petition and errors assigned, on January 27, 1923, made and entered its decision on said petition for a new trial wherein it decided that a new trial would be granted in said cause unless within thirty days from said date the plaintiff, defendant in error, filed his written consent that the verdict and judgment in said cause be reduced from \$3500.00 to \$3000.00, and thereafter on February 12, 1923, plaintiff, the defendant in error, filed in each of said causes his written consent that the verdict and judgment entered in said cause be reduced from \$3500.00 to \$3000.00.

Plaintiffs in error, under their statement of the case, attempt to review the evidence as disclosed by the record but in as much as such statement does not conform to what we believe the record discloses, we feel that we should make a short statement of what we believe the record shows, with a suggestion that we will go into detail on certain phases of it in our argument.

The evidence as shown by the record discloses that the policies sued on in this case were issued to the defendant in error by Wm. H. Jackson, agent of the companies, after an examination of the property by the

agent (Rec. 401), and without any written application being made therefor. (Rec. 267).

The property covered by the insurance consisted of what is known as the Idanha Hotel, located on the North half of Lot Four (4) and all of Lot Five (5), in Block Thirty-eight (38) in Soda Springs, Caribou County, Idaho, together with the hotel furniture, fixtures and furnishings, and other personal property described in the policies of insurance.

Mr. Enders, the defendant in error, purchased the above described real estate on which was located the Idanha Hotel from the Natural Mineral Water Company, a corporation, under an executory contract for the sum of \$4000.00, which was to be paid six (6) years from February 1, 1918, on which he was to pay 6 per cent interest per annum. Mr. Enders went into possession of the property on February 1, 1918, and continued in the possession of the property down to the date of the trial. The record discloses (pp. 290) that he expended on said property approximately \$3000.00 in the repair and improvement of the same, that he paid the taxes accruing thereon and the interest as it fell due upon the purchase price; that he purchased and installed furniture and fixtures therein, which were of the value of \$5000.00 at the time of the fire. (Rec. 288). Negotiations for the purchase and sale of this property began in the year 1917 and were carried on between Mr. Enders and Fred J. Kiesel on behalf of the

Natural Mineral Water Company, they were partly oral and partly written.

Mr. Kiesel was a director, in his life time, of the Natural Mineral Water Company, and was such at the time he carried on negotiations for the sale of the property in question. A deed for this property had been prepared at Ogden, Utah, in the life time of Kiesel, and forwarded to W. A. Clark of Montana for his signature, but the record does not disclose what became of this deed; after Mr. Kiesel's death, which occurred in 1919, Mr. Shearman, his son-in-law took charge of the affairs of the Kiesel estate, in November, 1919, he prepared a deed for the transfer of this property and sent it to Mr. Clark for his signature, as appears by plaintiff's Exhibit 8. Thereafter under date of May 11, 1920, as appears by Exhibit 5, J. K. Heslett of Butte, Montana, who was assistant cashier in one of Mr. Clark's banking institutions, advised Mr. Enders that the bank was in receipt of a deed from the Natural Mineral Water Company conveying the hotel property to him, to be delivered upon the payment of \$4000.00. Under date of June 14, 1920, J. K. Heslett, by letter, (Exhibit 6) forwarded the deed, (Plaintiff's Exhibit 4) to the bank of Soda Springs with instructions to have the deed delivered to Mr. Enders for inspection by his attorney with the request that the same be returned after such examination, but before the deed was returned, W. A. Clark, president of the Natural Mineral

Water Company, together with Mr. Heslett and Mr. Shearman, who represented the Kiesel estate, and was acting secretary for the Natural Mineral Water Company, went to Soda Springs in July, 1920, and in a conversation then had between Clark and Enders, it was agreed that the deed should be left at the Soda Springs bank in escrow, and at said time Enders informed Clark that Kiesel had agreed to give him six years time to pay for the property at 6 per cent, at which time Clark told Enders he would back up the agreement made by Kiesel. The conversation bearing upon the sale of this property will be referred to from the records more in detail in our argument upon this phase of the case.

The record discloses that the Books and records of the Natural Mineral Water Company had been destroyed or misplaced, (233); and that the business of the Natural Mineral Water Company was transacted in the office of the Fred J. Kiesel Company at Ogden, Utah (243); that the accounts of the Natural Mineral Water Company were kept upon the books of Fred J. Kiesel Company until that company was dissolved and since that time on the books of the Fred J. Kiesel estate.

Mr. Shearman testified that he was employed in the year 1917 by Fred J. Kiesel and occupied part of his time at the office of the Fred J. Kiesel Company; and that from that time on he was familiar with the affairs



of the Natural Mineral Water Company; that after Mr. Kiesel's death, in the year 1919, he was acting secretary of the Natural Mineral Water Company and collected all the rents, paid all the expenses and attended to all the affairs of the Natural Mineral Water Company (246-7). That the income consisted of certain water rentals, and interest paid by Enders upon the purchase price of the property in question and checks received therefor were received at the office of the Fred J. Kiesel Company and later the Kiesel estate, by Shearman, who endorsed them as acting secretary and credited them to the Natural Mineral Water Company; that he sold items of personal property of the Natural Mineral Water Company and attended to all matters. That he made statements of receipts and expenditures and of what he had done to Mr. Clark, and always communicated with Mr. Clark when anything of importance arose. That he had received a wire from Senator Clark to meet him in Soda Springs to go over the business of the Company, which he did. (249).

According to the record, the only parties who ever acted for the Natural Mineral Water Company were Senator W. A. Clark and Fred J. Kiesel, until Kiesel's death when Shearman acted as acting secretary. These parties did all the business of the Company. From the time negotiations were commenced in 1917, no one ever questioned the right or authority of Fred J. Kiesel and W. A. Clark to act for the Natural Mineral Water Company.



It is true that Exhibit 7, referred to by plaintiffs in error in their brief, and rejected by the court, shows that T. J. Nelson and Charles H. Lindley purported to act as directors of the Natural Mineral Water Company but the Exhibit 7, was not admitted. However the evidence does show that Exhibit 7, was found in the files of the office of Fred J. Kiesel, whom it was shown was a director and who was acting for and keeping the books of the Natural Mineral Water Company in his life time. (Rec. 232-234-235).

The property covered by the insurance in question was destroyed by fire on the 7th day of June, 1921, with the exception of a small portion of the personal property upon which there is no question as to the ownership in this case. At the time of such destruction the insurance was in full force and effect.

The policies were introduced evidence as plaintiff's Exhibits 10, 11, 12 and 13, (Rec. 267). The one issued by the Star Insurance Co., contained a statement on the back thereof in large letters as follows: "In case of fire notify the local agent." Immediately after the fire and on the same day, Enders, the defendant in error, notified Jackson, the local agent, that the hotel had burned, and Jackson told Enders, that he would notify the insurers at once, (Rec. 271) about a week thereafter Jackson, the local agent, told Enders that he had received information from the companies that the adjusters would be at Soda Springs in a very short time to

adjust the matter. About the same time, on June 12, 1921, Enders who stated he did not know very much about insurance companies, delegated and engaged Shearman of Ogden, Utah, to look after his interests with the insurers in the matter of taking care of the loss under said policies. (Rec. 272).

Shearman, at the request of Enders, agreed to and did act for him in the said matter, and on the 16th day of June, received a letter from the local agent, Jackson, which reads as follows:

“WILLIAM H. JACKSON, JR.  
Loans, Real Estate, Insurance.

Pocatello, Idaho, June 15, 1921.

Fred J. Kiesel Estate,  
Col. Hudson Bldg  
Ogden, Utah.

Gentlemen:

I have your letter of the 14th inst. regarding the insurance on the Idanha Hotel at Soda Springs.

I think the adjusters are working on this loss now and will probably want the policies within a short time and when they do I will let you know.

I will keep you advised as the case progresses. There is nothing we can do at present.

Yours truly,

WM. H. JACKSON, JR.,

WHJ-H

By R. D. Hoskins.”

Sometime in the latter part of June, Shearman on behalf of Enders had a talk with Young, one of the adjusters for the plaintiffs in error, at Salt Lake City, with respect to the loss by fire in question, and was advised at such time by Young that there had been a total loss and that he, Young, the adjuster, had found that Enders did not have a very good reputation; that the building was insured for more than it cost him and that Enders did not have title to the property and that he felt that Enders had had a hand in the burning of the building. (Rec. 354).

Sherman advised Mr. Young that he was representing Enders in the matter of furnishing proof, documents, or anything they required concerning the policies in question, and was informed by Young that if they needed anything that he would call upon him; and that the adjusters did thereafter call upon Mr. Shearman for information which was furnished them concerning policies and title to the property. (Rec. 357) and in fact he furnished all the information they did require and advised Enders that he had done so, as well as advising Enders of the communication he had with Mr. Jackson (Plaintiff's Exhibit 23), and at the request of the adjusters, obtained from Enders a detailed account of the expenses in repairing the building, which was furnished to the plaintiffs in error, (Rec. 358) and carried on negotiations for Enders with the adjusters until some time in April, 1922, with a view of settling the loss under these policies, (Rec. 361-62) and among

other things in these negotiations, furnished correspondence from the files in his office bearing upon the matter and procured a copy of the deed from the Soda Springs Bank through Enders, (Rec. 369), and in fact gave the adjusters the history of the entire transaction concerning the sale of the hotel property by the Natural Mineral Water Company to Mr. Enders, (Rec. 358).

Young was a member of the firm of Croxford & Young, Adjusters, who were the duly constituted adjusters of the plaintiff's in error (Exhibits 18 and 19, Rec. 286-287). Under the date of August 19, 1921, British & Federal Fire Underwriters, one of the plaintiffs in error, by Croxford & Young, its adjusters, wrote the insured, Enders, requesting him to furnish certain proof of loss as described in said letter; (it was stipulated that a similar letter was written for each of the other plaintiffs in error) pursuant to said request Enders wrote said adjusters under date of August 21, 1921, stating that he was preparing schedules as requested and would furnish them as soon as completed. (Exhibit No. 15). Thereafter on September 20th, defendant in error furnished a statement as requested (Exhibit No. 16). The plaintiffs in error received these proofs of loss and never made any objection in any manner to either Shearman or Enders with respect thereto. On October 24, 1921, Enders wrote the Star Insurance Company, one of the plaintiff's in error, stating that he had furnished to Croxford & Young, Proof of Loss, but had not heard anything concerning the same (Ex-

hibit 17); it was stipulated that a similar letter was sent by registered mail to each of the other plaintiffs in error) on October 28, 1921. Enders received from the Star Insurance Company, a letter stating that they had referred his communication to the Adjusters Croxford & Young (Exhibit No. 18) and on November 1, 1921, Commercial Union Assurance Company, wrote Mr. Eenders acknowledging his letter with reference to the destruction of the Idanha Hotel and stated that his letter had been referred to Croxford & Young, adjusters, for answer, as they had the matter in charge. Negotiations were carried on until some time in the year 1922, with a view of effecting a settlement upon these policies.

---

## ARGUMENT.

In considering the assignments of error which are discussed in the brief of plaintiffs in error, we will not take them up in order therein presented, but will treat them as they appear to us in the most logical sequence.

### I.

Under subdivision 11, on page 89 of their brief, it is contended that the interest of the insured in the property was not truly stated therein for the reason that he was no the sole and unconditional owner thereof and did not hold the land in fee simple upon which the building, the subject of insurance, stood.



It is urged that on account of the fact that it was alleged in the complaint that the plaintiff was the vendee of a certain executory contract entered into between plaintiff and the Natural Mineral Water Company, and by other allegations in the complaint, that the plaintiff has put himself out of court on account of the fact that the policies contained the following provisions:

“This entire policy shall be void if the interest of the insured in the property be not stated herein.

“This entire policy shall be void if the interest of the insured be other than an unconditional and sole ownership or if the subject of the insurance be a building on ground not owned by the insured in fee simple.”

The cases cited by plaintiffs in error do not even remotely support such a contention, but on the contrary bear upon the question as to whether the holder of an option for the purchase of real property is the unconditional owner within the meaning of such terms in the policy. The question then presented here is whether Mr. Enders, the assured, had entered into an irrevocable contract for the purchase of the property in question from the Natural Mineral Water Company.

It is contended by counsel for plaintiffs in error that Enders was merely a lessee of the premises with an option to buy. this contention is not borne out by the record, as there is no evidence whatever that shows or

tends to show that Enders was at any time the lessee of the premises in question, but on the contrary it is shown by the record that the assured had entered into an agreement for the absolute purchase of the property for the sum of \$4000.00, which was to be paid by him within six years from February 1, 1918, with interest at the rate of 6 per cent per annum; that he entered into the possession of the premises in question on said 1st day of February, 1918, and at all times thereafter, operated the same as his own; paid the interest on the purchase price as provided in his agreement to the Natural Mineral Water Company, vendor of said premises, expended approximately \$3000.00 in repairs, paid taxes and operated the property as his own.

The question as to whether the assured had entered into an absolute contract for the purchase of the property from the Natural Mineral Water Company, was a question of fact to be submitted to the jury, and such question was submitted to the jury under proper instructions and they found that the assured had entered into such a contract.

In this connection we call the court's attention to the following testimony as shown by the record:

Witness Enders:

Q. Did you purchase the hotel at that time, Mr. Enders?

A. Yes, sir. (Rec. 219).

\* \* \* \* \*

Q. What were the terms of that purchase, Mr. Enders?

A. Four thousand dollars.

Q. When should it be paid?

A. Well, whenever I could. [He wasn't going to work no hardship on me.

Q. Were you to pay interest on the amount?

A. Yes, sir. (Rec. 220).

\* \* \* \* \*

Q. Was a deed later prepared?

A. Yes, sir.

Q. Where was that deed placed?

A. In the Soda Springs Bank.

Q. Is the deed there now?

A. Yes, sir. (Rec. 221).

Witness Shearman:

Q. Was there any other conversation in the presence of Mr. Enders there, other than you have related?

A. I think there was considerable talk between Mr. Enders and Mr. Clark.

\* \* \* \* \*

A. I don't clearly remember what it was. I think it was concerning the paying for the property. Mr. Enders was talking to Mr. Clark, the president of the company, and I don't remember clearly what was said. I remember plainly about his saying he wanted the deed left in Soda Springs. (Rec. 252).

\* \* \* \* \*

Q. Well, do you know whether Mr. Enders has paid interest on the amount of the purchase price?

A. Yes, he has paid interest.

Q. And to whom did he pay that?

A. He sent it in to the office of the Fred J. Kiesel Company, or the Fred J. Kiesel estate, and it was credited to the Natural Mineral Water Company upon the books. (Rec. 253-4).

\* \* \* \* \*

(Cross-X)

A. The only interest I know that has been paid is the interest on the \$4,000 owing to the Natural Mineral Water Company, for the property.

\* \* \* \* \*

Q. How much interest did he pay, Enders?

A. Six per cent per annum on the \$4,000.

Q. From what time?

A. I think it was from some time in April, 1918, but I am not positive about that. It was when he assumed, took over the property.

\* \* \* \* \*

A. I am not certain. I think it was in the early spring of 1918, if my recollection serves me.

Q. The spring of 1918?

A. I think that is when Mr. Enders took the property, yes, sir, or maybe the first of the year I—.

\* \* \* \* \*

A. Oh no. Negotiations began in 1917.

Q. How do you know that?

A. By correspondence and files.

Q. And this interest that you speak of was from 1918, you say,—in the nature of rent of the property, or what was it?

A. Interest on the \$4,000 at six per cent.

Q. What \$4,000?

A. \$4,000 of the purchase money.

Q. Why do you speak of it as purchase money?

A. The property was sold to Mr. Enders for \$4,000.

Q. How do you know that?

A. I know from the correspondence. I know because Mr. Kiesel told me he had sold it.

(Rec. 254, 255, 256)

\* \* \* \* \*

Q. And how long have you been receiving it—  
from 1918?

A. No sir, not personally. I didn't take charge of Mr. Kiesel's estate entirely until November 15, 1919. I did, however, run the office from the time of his death. I was in the bank, and I also had to go up and run the affairs of the office. (Rec. 257).

\* \* \* \* \*

Q. When did you begin seeing the checks there?

A. In 1918—1919. (Rec. 259).

\* \* \* \* \*



(Re-Direct Ex.)

Q. Was this check referred to in the letter credited to the account of the Natural Mineral Water Company?

A. Yes, sir. (Rec. 260-1).

Witness Enders:

Q. Did you receive tax notices and were taxes levied upon the Idanha Hotel property that you bought?

A. Yes, sir.

Q. Were they addressed to you?

A. Yes, sir.

Q. The notices?

A. Yes, sir.

Q. And did you pay them?

A. Yes, sir, I didn't pay them one payment and they got delinquent on me last year, but I took them up and paid them again.

Q. You have taken them up since?

A. Yes. (Rec. 266).

\* \* \* \* \*

A. Why, in 1917, Mr. C. T. Woodall was in possession?

Q. And do you know the occasion of Mr. Woodall leaving possession? Who did he give possession to?

A. To me.

Q. Do you know at whose request?

A. At Mr. Kiesel's. He sent me a letter on Mr. Woodall, and the letter says: "Mr. Woodall, you will please vacate Idanha Hotel. I have sold it to Mr. Enders." (Rec. 267).

\* \* \* \* \*

(Cross Ex.)

Q. You had the option to purchase that property for \$4,000, didn't you?

A. Yes, sir.

Q. And you have never exercised that option, have you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. When?

A. By paying the interest on it, and they give me six years time to pay it in. (Rec. 310).

\* \* \* \* \*

(Cross-Ex.)

Q. When did that six year run from?

A. From the first of February, 1918.

Q. From the first of February, 1918?

A. Yes, sir.

Q. Well, how did you come to arrive at that statement, that it was to run from the first of February, 1918?

A. Why that was our agreement.

Q. What agreement?

A. With me and Mr. Kiesel.

Q. With you and Mr. Kiesel?

A. Yes, and he represented the Natural Mineral Water Company; he was talking for the Natural Mineral Company, and he sold this Natural Mineral Water Company property. (Rec. 310).

\* \* \* \* \*

(Direct Ex.)

A. I suggested to Mr. Clark that I wished him to leave the deed in the Soda Springs Bank, as it would be more convenient for me, and he told me that that would be all right, and he said, "Now Mr. Enders," he said, "I want you to understand everything you done with Mr. Kiesel I am going to back up." (Rec. 262).

\* \* \* \* \*

A. I told Mr. Clark, I says, "How about payment, Mr. Clark? Mr. Kiesel agreed to give me six years time to pay it in" and he said, "that will be all right, Mr. Enders."

Q. Mr. Kiesel gave you what?

A. Six years time to pay it in at six per sent, and they wasn't in any hurry, they didn't need the money very bad, they didn't want to press me any. He said, "we know, Mr. Enders, we want you to have that property and we know you are entitled to it; you have worked for us for the last twelve years and we have tried to show you that we are your friend, we try to do something for you." (Rec. 264.)

Q. You were to have six years from when to pay for the property?

A. From the time I took it over.

A. The first of February.

Q. What year?

A. 1918

By Mr. Jones:

Q. Mr. Enders, you stated, I believe to counsel, that you had an option on this hotel. Do you know what an option is?

A. When you buy—enter in with a fellow and make an agreement with him and buy it and you pay so much money for it, and then the second time come, and if you don't pay it he makes you pay it, just like you go down in the store and get some groceries and you take them home, and he wants his money, and you don't pay him and he sues you for it. (Rec. 342).

In the case of Milwaukee Mechanic's Insurance Company vs. B. S. Rhea & Sons 123 Fed. 9, the principal question that was presented to the court in said case was whether there had been an unconditional contract for the purchase of the premises upon which the building destroyed was located, and as the matter had been submitted to a jury which found there was an unconditional contract, we desire to quote from the decision in that case so that a comparison of the evidence therein may be made with the evidence in the instant case:

Both Mr. Rhea and Mr. Berry state that no date was fixed for the payment of the price of the warehouse, both saying that he was to pay "when he could," or "when he could sell it," or "when it suited him," but that until he did so pay he was to pay annually the interest on \$15,000 and keep the property in repair, insured, and the ground rent paid; and both agree that all of these agreed payments had been made from 1893, down to the date of the fire, but that no part of the principal of the price had been paid. The evidence also showed that Rhea & Son gave notes for the securities returned to them and for the new money borrowed, but gave none for the price of the warehouse, or the old debt paid by its original transfer.

There was evidence, in part drawn out by cross-examination, which did have a strong tendency to indicate that Rhea & Son never did absolutely obligate themselves to buy the property, and that no notes were given for this property, because they were unwilling to incumber themselves to that extent. In further support of the theory of a mere option it was shown that the proofs of loss were made by the banks as owners, and that these were forwarded, with a letter from Mr. Rhea, in which he stated that Rhea & Son had been mere lessees of the warehouse and had no interest in the insurance; but there were also certain explanations of these inconsistent statements, which went to the jury with other evidence upon the issue as to whether they were lessees or owners.—Copied from the opinion of the court in Milwaukee Mechanic's Ins. Co. vs. B. S. Rhea and Son, *supra*.



The proposition that a vendee under a contract for the purchase of land is a sole and unconditional owner within the meaning of a policy of insurance is supported by practically all the authorities.

Thus in *Milwaukee Mechanic's Ins. Co. vs. Rhea*, 66 C. C. A. 123 Fed. 9, it was said that it was "hardly the subject of debate," that the vendee in possession under a written agreement for the sale and purchase of property was the equitable owner thereof, and authorized to represent himself in a contract of insurance as the sole and unconditional owner.

And quoting further from the same opinion, the court said:

A vendee, in possession of property under a parol agreement by which he unconditionally bound himself to buy and pay for the property, is the "sole and unconditional owner," within the meaning of that term as used in fire insurance policies, and may truthfully represent himself as such in an application therefor.—*Milwaukee Mechanics' Ins. Co., of Milwaukee, Wis. vs. B. S. Rhea & Son, et. al* 123 Fed. 9.

So in *Baker vs. State Ins. Co.* 31, Or. 41, 65 Am. St. Rep. 807, 48 Pac. 699, it was held that a warranty that the assured was the sole and unconditional owner of the insured property, and that the title to the land was in her name, was not broken by the fact that the legal title had not been conveyed to the assured, where she

had gone into possession under a contract of purchase, and had performed on her part all the conditions therefor to date of the application.

And in *Phoenix Ins. Co. vs. Kerr*, 66 L. R. A. 569, 64 C. C. A. 251, 129 Fed. 723, it was held that the vendee of the property, who was in possession of it under a contract whereby the former owner had absolutely agreed to sell, and the buyer had absolutely to buy, on definite terms, was the sole and unconditional owner, within the true meaning of the clause upon this subject in insurance policies, because the vendor could compel the purchaser to pay for the property notwithstanding its injury or destruction.

And in *Evans vs. Crawford County Farmers' Mut. F. Ins., Co.*, 130 Wis. 189, 9 L. R. A. (N. S.) 485, 118 Am. St. Rep. 1009 109 N. W. 952, it was said that the fact that one was in possession of land under a land contract, and was not in default, made him to all intents and purposes the owner of the premises, so that his interest was of sufficient dignity to satisfy a stipulation in a policy of insurance as to his interest being the entire, unconditional and sole ownership.

Quoting from the opinion of the court on pp. 447:

It is a settled rule of law that, under a contract which portends a present sale of realty, an equitable conversion takes place, and that the property will henceforth be treated in legal consequence as if the legal title had actually passed.—Vancouver

Nat. Bank vs. Law Union & Crown Ins. Co. 153, Fed 440.

The interest of a purchaser of property which he has unqualifiedly agreed to buy, and which the former owner has absolutely contracted to sell, on fixed terms, is the sole and unconditional ownership within the meaning of the ordinary clause upon that subject in insurance policies.—Insurance Co. of North America vs. Erickson, 39 So. 495, 50 Fla 419, 2 L. R. A. (N. S.) 512, Ill. Am. St. Rep. 121; Citizens' Ins. Co., of Missouri vs. Same, Id.

Insured was in possession of property under an agreement that upon the payment of a certain sum his conditional fee should become absolute, and the deed was in escrow, for delivery on the performance of the condition Held, that insured was the sole and unconditional owner, within the meaning of a policy providing that it should be void if the interest of insured was not sole and unconditional.—Davis vs. Pioneer Furniture Co., 78 N. W. 596, 102 Wis. 394.

The interest of a vendee of realty under a land contract is "sole and unconditional ownership" within the meaning of a fire policy stipulating that it shall be void if the interest of assured shall be other than sole and unconditional ownership.—Mathews vs. Capital Fire Ins. Co., 91 N. W. 675, 115 Wis. 272.

There was no breach of the policy condition of ownership of the property in insured, because he was in possession merely under a contract to purchase the property on monthly installments, though

owning to its informal character, he and the seller later entered into a more formal and complete contract in reference to the sale.—*Ramirez vs. United Firemen's Ins. Co. of Philadelphia*, 189 P. 309.

A vendee in possession under a contract not signed by him, but referring to an application to purchase signed by him, was within the rule that the holder of an equitable title is the "unconditional and sole owner" within the meaning of that condition in a policy.—*McCollough vs. Home Ins. Co., of New York*, 102 P. 814, 155 Cal. 659, 18 Ann. Cas. 862.

Though it be not recorded, one who has made a contract of sale of property, on which the purchaser has made payment, and under which he has entered into possession, is not the sole and unconditional owner, as required by a fire policy thereon, taken out by him.—*Sherman vs. Continental Ins. Co., of City of New York*, 138 P. 708, 167 Cal. 117, 52 L. R. A. (N. S.) 670.

A vendee of land occupying it under an executory contract, on which he has paid a portion of the price, and on which he has erected a building, is an "unconditional and sole owner" in fee simple within the condition of a fire policy providing that it shall be void if the interest of insured is other than unconditional and sole ownership of the fee simple title.—*Jordan vs. Hanover Fire Ins. Co.* 66 S. E. 206, 151, N. C. 341.

A vendee of land occupying the same under an executory contract of purchase is the unconditional and sole owner of the same and of the fee-simple

title thereto, though the entire purchase price has not been paid, within the condition of a fire policy avoiding the same, if the interest of insured be other than the sole and unconditional ownership, or if the subject of insurance be located on ground not owned by insured in fee-simple.—Arkansas Ins. Co. vs. Cox 98 P. 552, 21 Okl. 873, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808.

Policies of insurance generally contain, in addition to the clause in regard to the sole and unconditional ownership of the assured the further stipulation that the latter owns the ground upon which the insured buildings are situated in fee-simple; and it has been almost universally held that the fact that the assured has not the legal title but holds the land under a contract of purchase, will not render such stipulation untrue.

Thus, in *Dooly vs. Hanover F. Ins. Co.*, 16 Wash. 155, 58 Am. St. Rep. 26, 47 Pac. 507, it was held that breach of the condition in a policy of fire insurance that the policy should be void is the interest of the assured was other than unconditional or sole ownership, or if the subject of insurance was a building on ground not held by the assured in fee simple, would not prevent a recovery by the assured for loss, where the application for the policy was an oral one, and no questions were asked concerning the title, and no intentional misrepresentation in regard thereto was made by the assured.

And such was the conclusion reached in the following cases: *Lewis vs. New England F. Ins. Co.*, 24 Blatchf.



181, 29 Fed. 496; Pennsylvania F. Ins. Co. vs. Hughes, 47 C. C. A. 459, 108 Fed. 497;

The rule here under discussion was carried still further in Williams vs. Buffalo German Ins. Co. 17 Fed. 63, in which it was held that the sole and unconditional ownership clause was not breached by the fact that the assured did not have the legal title, but was a vendee under a bond for title, even though his vendor had only a life estate in the property and six-sevenths of the remainder.

We also call attention to the case of Fire Insurance Company vs. Hughes, 108 Fed. 497, which discusses the point now under consideration and other points involved in the instant case.

The question as to whether an agreement between the parties thereto was an absolute sale or only an option was one for the jury.

Jenkins & Reynolds Co. vs. Alpine Portland Cement Company, 147 Fed. Found on pp. 654;

Milwaukee Mechanics' Insurance Co. vs. Rhea, *supra*;

Dickinson vs. Scruggs, 242 Fed. 900;

It is contended by plaintiff in error that there was no evidence to show any authorization upon the part of the directors of the Natural Mineral Water Company

to sell or dispose of the property in question on account of the fact that Exhibit 7 being a purported resolution by the Board of Directors authorizing the sale of the property was rejected by the Court. It is undisputed that Fred J. Kiesel in his lifetime was a director of the Natural Mineral Water Company and that he acted as business manager and handled the affairs of said corporation.

It is further undisputed that Senator Clark acted as president of said company, executed the deed which was held in escrow as president of the company, and that the acknowledgement of the Notary on said deed recites that the Notary knew W. A. Clark to be the president of such company. It is also undisputed that the business affairs of the corporation were handled in the office of Kiesel during his lifetime and after his death; that the negotiations for the transfer of this property began the middle of 1917 and that ever since that time, Kiesel held himself out as the business manager of the said corporation and Clark as the president thereof, and that these two parties held themselves out to the world as directors, officers and managers of said property during all of said time.

It is also undisputed that after the death of Kiesel, Mr. Shearman was the acting secretary of the company and that his acts insofar as selling any property of the company, collecting rentals, and interest, and handling all affairs of the company which he did, was never

questioned by any officer or stockholder of the company insofar as this record discloses.

It is undisputed that Kiesel and Clark acted with Enders in the matter of the sale of this property and it is apparent that the officers of the corporation must have known what Kiesel and Clark had done. If not, they would be charged with the knowledge of such fact, as Enders was in possession of the property from February, 1918, and since that time paid the taxes, made large repairs, paid interest on the purchase price which interest was received and accepted by the corporation. Clearly Clark and Kiesel were de facto officers of said corporation, and Kiesel a de jure director. In view of the above facts, even though the record does not disclose that there was a previous authorization of the contract made by Clark and Kiesel for the Natural Mineral Water Company with Enders, yet under the facts and circumstances the same became ratified by said corporation and became as binding as if previously authorized.

A corporation may ratify and become bound by the unauthorized acts or contracts of its directors, officers or agents, which are within the scope of its corporate powers and which might have been previously authorized by it, thus a contract made by the president, although invalid at the time when it is entered into, may be made good by ratification.

A corporation may execute a conveyance, not only by its duly executed officers, but by persons who are defacto officers.—14 A. C. J. pp: 534, Par. 250.

Where a corporation takes and retains the benefits of an unauthorized act or contract of an officer or agent, it ratifies such contract,—14 A. C. J. pp. 387, Par. 2241.

It is a well known principle of law that where a third person deals with another who professes to act as an officer or agent for the corporation, he is generally estopped as against the corporation to deny the character and authority of such officer or agent and the validity of his acts thereunder.

14 A. C. J. pp. 372, Par. 2231.

A third person cannot avoid a contract with a corporation on the ground of mismanagement of the corporations' officers in making the contract, nor can he do so where he received the benefit of the contract on the ground that it was *ultra vires*.

14 A. C. J. pp. 372, Par. 2231.

If this be true, then Enders in the present case in an action by the Natural Mineral Water Company against him to enforce the contract, could not plead the want of authority on the part of Kiesel and Clark, by analogy it would certainly follow that the insurance companies, absolute strangers to the contract, would be

estopped to plead the want of authority of these officers.

Under the facts and circumstances in this case, Clark and Kiesel are presumed to have had the right to act. Even a usurper can assume the dignity of an officer defacto when he continues to act so long or under such circumstances as to raise a presumption of his right to act; in such case his acts are valid as to third persons and the public. Thompson on Corporations, Sec. 1440.

It is significant in this case that Shearman the present manager, acting secretary of the Natural Mineral Water Company, testified on behalf of the plaintiff to the effect that the sale was made to Enders and that the Natural Mineral Water Company does not question Ender's ownership in the property and that the secretary knew of the negotiations under which the sale occurred. In other words, the Natural Mineral Water Company at all times recognized the validity of the transaction and admitted the ownership of the property in Enders. The only persons who question Ender's title are the plaintiff's in error. Yet said companies are absolute strangers to the transaction between Enders and the Natural Mineral Water Company. It is a well recognized rule that a stranger to a transaction between contracting parties cannot collaterally question the validity of such contracts. This is particularly true where both parties to the original contract at the time of the trail admit its validity.



Quoting from Thompson on Corporations, at Section 1443:

“Upon the principles of policy and justice, the law will hold valid the acts of officers de facto, so far as they involve the interests of the public and third persons dealing with the corporation in good faith. In an early Pennsylvania case, it was held that a corporation could act by means of a de facto officers as fully and effectually, as regards to the public and third persons, as by an officer de jure, in respect to all matters within the scope of the corporations’ ordinary business.”

Quoting Section 1447 from Thompson on Corporations:

“It is very well settled, and for good reasons, that the acts of de facto officers are not subject to collateral attack. This very common principle that runs through the entire body of the judicial system, is applied to the acts of officers de facto of corporations. Thus, a collateral attack was not permitted on an agreement executed by persons acting as officers of a corporation under an assumed election, but ineligible to the offices at the time of their election.

In this connection, we direct attention to the fact that it was affirmatively plead by the plaintiffs in error that Enders was not the owner of the property but that the Natural Mineral Water Company was such owner. In view of which fact the burden was upon the plaintiffs in error to prove such fact, yet no evi-

dence was offered in support of such affirmative allegations.

It is only necessary in this case for Enders to make a *prima facie* case of ownership and when he had so done, it devolved upon the defendants below to show any lack of authority on the part of Clark and Kiesel to represent the Natural Mineral Water Company.

The evidence in this case abundantly establishes *prima facie* ownership in Enders of the property in question. He had undisputed possession, dominion and control of the property from February 1918, repaired the same at a large expense, paid the taxes and interest on the consideration. All of these facts, together with the facts and circumstances surrounding the purchase of the property, placing the deed in escrow, fully establish his *prima facie* ownership in said premises.

Plaintiff's ownership or insurable interest in the property destroyed must be established by a preponderance of evidence. In the absence of evidence that the property is encumbered or belongs to another than insured, the issuance of a policy to insured on property therein described is *prima facie* evidence of insured's title to, or insurable interest in, such property at the time of the delivery of the policy.—26 C. J. 539; U. S.—Royal Ins. Co. vs. Taylor, 254 Fed. 805, 166 C. C. A. 251, and other cases under foot note 77.

A *prima facie* case of ownership is also made by proof of possession and control of the property—26 C. J. 539, and foot note 78.

“Proof that the insured was in possession of the premises claiming it as owner, is in the absence of evidence to the contrary, prima facie evidence of title and of insurable interest.”—*Franklin Fire Insurance Co. vs. Chicago Ice Company*, 36 Md. 102, 11 Am. Rep. 469;

In the case of *Farmers' State Bank of Parker, et al, vs. Tri-State Mut. Grain Dealers' Fire Ins. Co.*, 41 South Dakota, 398, an action was brought to recover on a fire insurance policy, the subject of the insurance was a grain elevator situated on a railroad right-of-way, and certain grain therein contained. In disposing of the question as to the ownership, the court said:

“It is contended by appellant that the said Meier was not the owner of the insured property at the time the policy was issued, nor at the time of the loss; but that the same was owned by the Farmers' Elevator Company, a corporation, and that for that reason plaintiffs were not entitled to recover. It was not disputed that the elevator had belonged to the Farmers' Elevator Company, and that prior to the issuance of the policy involved in this action appellant had insured said elevator as the property of the said elevator company; but, when the present policy was issued, Meier directed appellant to issue it to him individually. At that time Meier was in possession of the property, claiming to be the absolute owner thereof, and was operating it as his individual property. He had caused an addition thereto to be built. This he paid for from his individual funds. The ground on which the

elevator stood was leased by the railway company to Meier individually. It was not claimed, nor attempted to be shown, that any person or company, other than Meier, had any beneficial interest in the property, or that any other person suffered loss by the destruction thereof. The claim made by appellant was that no formal transfer or conveyance of the property from the Farmers' Elevator Company to Meier was shown. This was not necessary under the circumstances in this case. Where a person is in the sole possession, control, and enjoyment of personal property, claiming to be the absolute owner thereof, a prima facie case of ownership is made out. It is not claimed that there was any concealment or attempted fraud practiced by Meier in procuring the policy. Appellant made no inquiries touching the condition of the title to the insured property, nor is it claimed that the condition of the title in any manner involved or increased the hazard, either moral or actual.

As was said in the case of Manchester Fire Insurance Co. vs. Abrams, 89 Fed. 932, 32 C. C. A. 426:

“It has been uniformly held, notwithstanding the stipulation that the policy shall be void if the interest of the insured be less than that of the fee simple title to the land whereon the insured property so situated, that the stipulation is complied with if it appear that the insured is substantially or equitably the owner of the property, and entitled to the benefits of the same.”

As was said in the case of Prichard vs. Conn. Fire Insurance Co., 203 S. W. (Mo.) 223:

“There is nothing in defendants’ contention that there is no proof that plaintiff owned the property, because his wife testified without objection that the property was owned by her husband and herself and that she notified the agent of this fact and that the agent agreed to insure it in the name of her husband.”

It was held in the case of Morris vs. Imperial Ins. Co., 32 S. E. 595:

“Where to a suit upon a policy of fire insurance the defense is interposed that at the time the policy was taken out by the insured he was not the **owner** of the property thereby covered, the **burden of** satisfactorily establishing this contention rests upon the defendant, notwithstanding it may be incumbent upon the plaintiff, in order to make out a prima facie case, to show that the property in question alleged to have been destroyed by fire belonged to him at the time the same was burned.”

As was said in the case of Thermal Belt Sanatorium Co. vs. Royal Insurance Company, 73 S. E. 337:

“This is a case where title is presumed prima facie from the possession and control of the property, and, further, the issuance of the policy to the insured was itself prima facie evidence of title—conclusive for the purposes of such an action as this unless in some way questioned or impeached.”



In the case of Kobin vs. St. Paul Fire Insurance Co.,  
137 N. W. 753:

“Where insured, suing on a fire policy covering a dwelling house, described in the policy as insured’s dwelling house, proved possession of the property at and prior to the issuance of the policy on an application representing that the building was on land owned by him, there was *prima facie* evidence of his title to the real estate to authorize a recovery.

## II.

It is contended under subdivision 3 of the Argument in the brief of plaintiffs in error that the policies were voided and recovery procluded thereon on account of misrepresentation by Enders as to the condition of his title, as to the nature and character of incumbrance, and as to the value and amount of loss.

The policies in question were prepared and written by Wm. H. Jackson, Jr., the local agent of the companies, without written application and the evidence is silent as to any statement on the part of Enders. In this connection, we call your Honors’ attention to the 3rd affirmative defense of the plaintiffs in error wherein it is alleged that Enders procured to be attached to the policies of insurance the mortgage clause set forth in said policies, in favor of Fred J. Kiesel estate mortgage, as its interests might appear, and had inserted in said policies the provision that the loss,

if any, on the building only, subject to all the terms and conditions of the policy, was payable to the assured and Fred J. Kiesel Estate as the mortgagee.

This being an affirmative defense the burden of proving the same rests on the insurer, yet there was not one iota of evidence offered on the part of the plaintiffs in error to support such contention. In considering this phase of the case they say that Enders testified that the Kiesel Estate had no interest in the property, while Exhibit 16, the Proof of Loss made after the fire contains a statement by Enders that Fred J. Kiesel had an interest in said property as security in the sum of \$5400.00. It is true that such a statement is contained in Exhibit 16, but it is only fair to say that said Exhibit also contains the following statement: That he was the owner of said building and the land on which the same stood by purchase thereof under contract and escrow agreement from the Kiesel Estate and ex-Senator Clark.

The testimony of Mr. Enders on cross examination with reference to this statement is as follows:

Q. Now in the affidavit of your proof of loss which you have identified and which is marked Exhibit 16, you made this statement: "That the Kiesel Estate has and holds an interest in said property as security in the sum of about \$5400.00?"

A. That should read the Natural Mineral Water Company, that is an error of Melvin, the attorney.

Q. Then this is not true?

A. It should read Natural Mineral Water Co.  
(Record 322)

Exhibit 16 was signed on September 20, 1921, after the adjusters had been in conversation with Shearman and had obtained from him information upon the nature of the title and had an opportunity to examine the correspondence bearing upon the same.

The question as to whether the attorney for Enders properly understood him at the time he prepared the statement in question, was a question of fact for the jury and they evidently believed the explanation made by Mr. Enders. In this connection, however it should be borne in mind that Enders was not an educated man and even if he told his attorney at the time said affidavit was prepared that he was the owner of the land in question by purchase under contract and escrow agreement from the Kiesel Estate and Ex-Senator Clark, it can be easily understood how Enders might reach such conclusion as Senator Clark and Kiesel were the only parties as far as the record shows who ever attempted to exercise any ownership over the property or deal with the same, besides it is shown by the record that Mr. Enders had been in their employ for twelve years, and insofar as [Mr. Enders was concerned Clark and Kiesel to him appeared to be the owners of the property; the mere fact that the title was held by the Natural Mineral Water Company would not mean much,

if anything, to an illiterate man such as Mr. Enders.

Your Honors readily appreciate that where property in the name of a corporation, the principal stock of which is owned by one or two individuals who identify themselves with the property, will by laymen generally be considered to be the owners thereof. Laymen do not draw the distinction in matters of that kind that lawyers or educated men of affairs do with reference to the technical ownership of the property. It must also be borne in mind that it was Kiesel who caused the property to be vacated by a tenant and placed Mr. Enders in possession thereof.

However that may be, it would be a far cry to say that Enders ever wilfully intended to mislead the insurers in respect to the matter and even if Melvin, his attorney, did get the matter confused in the proof, it is patent that Enders was trying to give a statement to him as to the true ownership of the property to the best of his honest belief. As further evidence of this fact it will be seen from the record that he added to the \$4000.00 he owed for the property, the sum of \$1400.00 which he owed to Mr. Shearman, showing conclusively that he was not trying to conceal or mis-state any matter, but disclosed everything he knew, though in a confused way.

Unless specific inquiries in regard thereto are made by insurer or demanded by the policy insured need not disclose the existence of liens and en-

cumbrances on the insured property.—26 C. J. 183.  
See foot-note under 93.

In view of the above principle of law it will be readily apparent that the statement in Exhibit 16, that Enders was not required to have set forth therein anything further than that he was the unconditional owner of the premises in question and that the statement, if properly recorded by his attorney, that he purchased the same under a contract and escrow agreement from the Kiesel Estate and ex-Senator Clark, or that the Kiesel Estate had an interest in said property as security in the sum of \$5400.00 was entirely immaterial. Again, even if it be assumed that Enders procured Jackson to insert a provision in the policy making it payable to the Kiesel Estate as it interests may appear as mortgagee or trustee, the insertion of the same would be wholly immaterial because under the facts and circumstances in this case, Enders was the sole and unconditional owner of the property and when he made such a statement that is as far as he was required to go and it could not be construed under any theory as material misrepresentation, or effect the rights of recovery by Enders who was the party interested, besides there was no incumbrance on the property.

It is almost a universal rule that where a vendee of real property who is in possession thereof under a valid, executory contract of sale, represents in an application for fire insurance that his interest is sole and



unconditional, he is not guilty of mis-representation, avoiding the policy under a clause requiring that if the assured is not the sole and unconditional owner he shall so state.

Rumsey vs. Phoenix Ins. Co., 1 Fed. Rep. 396, 2 Fed. Rep. 429; Milwaukee Mechanics' Ins. Co. vs. Rhea, 123 Fed. Rep. 9, 60 C. C. A. 103; Lewis vs. New England F. Ins. Co., 24 Blatchf. (U. S.) 181.

Loventhal vs. Home Ins. Co., 112 Ala. 108, 20 So. Rep. 419.

Bonham vs. Iowa Cent. Ins. Co. 25 Iowa 328; Lamb vs. Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. Rep. 497.

Knop vs. National F. Ins. Co., 101 Mich. 359, 59 N. W. Rep. 653.

Martin vs. Jersey City Ins. Co., 44 N. J. L. 273; Martin vs. State Ins. Co., 44 N. J. L. 485.

New York—Dohn vs. Farmers' Joint-Stock Ins. Co., 5 Lans. (N. Y.) 275; Acer vs. Merchants' Ins. Co., 57 Barb. (N. Y.) 68.

Baker vs. State Ins. Co., 31 Oregon 41, 48 Pac. Rep. 699.

The same rule applies where the vendee is in possession under a bond for title. Williams vs. Buffalo Ger-

man Ins. Co., 17 Fed. Rep. 63; Pennsylvania F. Ins. Co. vs. Hughes, 108 Fed. Rep. 497, 47 C. C. A. 459; Hamburg Bremen F. Ins. Co. vs. Ruddell, (Tex. Civ App. 1904) 82 S. W. Rep. 826.

It has been said that the object of a clause in a policy of fire insurance requiring the insured to be sole and unconditional owner is to make sure that the person seeking the insurance is the real and substantial owner of the property in it, on which he intends to obtain insurance and thereby to prevent waging policies and fraudulent losses. The state of the title otherwise than in this view is not material. *Lewis vs. New England F. Ins. Co.* 29 Fed. Rep. 496.

And the courts in refusing to hold that such a clause refers to the legal title, rather than the interest or ownership, have stated their reasons therefor in language similar to that used in *Johannes vs. Standard Fire Office*, 70 Wis. 196, 35 N. W. Rep. 298, wherein the court in discussing the question says: "The condition does not relate to a legal title in fee-simple nor is that the interest described. An equitable title if sole and unconditional answers the description fully, and if the property was destroyed the entire loss would fall upon the plaintiff.\*\*\*\*\* The plaintiff by the contract and its part performance had acquired an absolute vested interest in the property which he could encumber, or sell and which would descend to his heirs. He was\*\*\*  
\*\*\*\*\*to all intents and purposes the sole owner."

Section 5030 of the Idaho Compiled Statutes provides:

“Any person who, knowing it to be such, presents, or causes to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract insurance or who prepares, makes or subscribes false or fraudulent account, certificate, affidavit, or proof of loss or other document or writing, with intent that the same be presented or used in support of such a claim, shall be guilty of a misdemeanor.”

The Supreme Court of the State of Idaho in constructing this section in the case of *Carroll vs. Hartford Fire Insurance Co.*, 28 Ida. 466, 154 Pac. 985, held:

“Under this section an essential element of the offense of swearing falsely to a proof of loss on an insurance policy is the intent to defraud, and unless such intent is shown, the fact that the insured incorrectly stated in the proof of loss his interest in the property destroyed is no defense in an action on a policy which by its conditions is to be void in case of any fraud or false swearing by the insured.

It is a well recognized rule that where a state court had construed its own statute that the Federal Courts would follow its construction.

It is urged by plaintiffs in error that Enders made a false statement with respect to the value of the prop-

erty and in support of such contention state that he valued the same in his statement referred to, as \$25,000 and that the highest value placed by any witness was \$15,000.00.

In this connection we direct attention to the fact that the court refused to admit evidence to fix the value by the cost of replacement, but limited the testimony as to the value that the property would sell for at the time of the fire, however he did permit Mr. Enders to testify under a rule of our Supreme Court, which permits the owner to testify without qualification, and that Enders' testimony was that it was worth \$25,000.00, which corresponds with the amount set forth in his statement.

An examination of the record will disclose that the building in question was a frame building finished outside with rustic and inside with lath and plaster, containing 42 bedrooms, and that there as a frame annex on the east side with a kitchen and store room below and 18 bedrooms above, that the hotel contained four big fire places, was plumbed, had running water on the first and second floors, first class mill work throughout, that the main building was 60 feet wide and 90 feet long and the annex was 60x30 feet, the wall plates were about 40 feet high. The main building was three stories high and the annex was two stories high; that the interior was in first-class condition after the same was repaired at an expense of \$3000.00. The income

from the property was \$225.00 per month, which would be \$2700.00 per annum.

It being undisputed that this property was earning that amount, it would suggest itself at once to your Honors that there is no basis for the charge of misrepresenting the value. It is apparent that that amount would be a good return on a value of \$25000.00 after allowing for expenses and interest. A photograph of the building was introduced in evidence, to which we invite your attention. With respect to the taxation on the property, the record shows that the court did not admit the same for the purpose of having any bearing upon the value of the property.

Further there was no affirmative allegation that Enders mis-stated in his proof of loss the value of said property.

There is not one iota of evidence in the record which shows or tends to show that Enders at any time made any statement, either written or oral, knowingly or wilfully with intent to deceive the defendants, on the contrary the whole evidence shows that Enders was an ignorant man and the statements he made were for the purpose of enlightening the defendants and not in any way prejudice, or tend to prejudice, the defendants or to influence their conduct or to conceal any facts, or that the defendants relied upon or in any manner were prejudiced in their defense by any statement either written or oral of Mr. Enders.



It is only fraudulent false swearing, in furnishing the preliminary proofs or in the examinations which the insurers have a right to require, that avoids the policies.

It is for the jury to determine whether such swearing was false and fraudulent.—The Republic Fire Insurance Company vs. Charles Weide, et. al. 81 U. S. Supreme Court Reports, 375, 20 Law Ed. 894.

Quoting from the Court's opinion, on pp. 896:

It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent.

False swearing in order to avoid a policy must be knowingly and wilfully done.—Carrol vs. Hartford Ins. Co. 28 Ida. 466, 19 Cyc. 855; Merrill v. Ins. Co. 23 Fed. 245.

A false statement or representation though wilfully made will not avoid or work a forfeiture of a policy when such statement could not deceive the company.—Shaw vs. Schottish Comm. Ins. Co. 1 Fed. 761.

### III.

PLAINTIFF DID NOT SEEK TO RECOVER, NOR DID HE RECOVER, UPON A CONTRACT OTHER THAN THE POLICY ATTACHED TO THE COMPLAINT.

It being the settled law that a vendee under an executory contract for the purchase of real property is the sole and unconditional owner of the same within the meaning of a condition in a policy requiring that the insured be the sole and unconditional owner, and it being the law, as heretofore mentioned in this brief, that unless specific inquiries are made by the insurer or demanded by the policy as to whether there are any incumbrances on the insured property, that the insured is under no obligation to disclose the existence of any liens and incumbrances on the insured property, where he is the sole and unconditional owner thereof. It was wholly immaterial insofar as the action in this case upon the policy was concerned that plaintiff alleged that he had advised the agent who wrote and issued the policy, that the Natural Mineral Water Company had been the original owner of said property and had sold the same to the plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase price was paid to deliver the deed to the plaintiff, or that the plaintiff advised the agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as its interests might appear, for the reason that there was no legal duty on the part of the insured to do so as he was the primary party interested and he was the sole and unconditional owner of the property.

It was further immaterial that it was alleged in the complaint that the agent of the company by mistake,

or otherwise, inserted the clause making the insurance payable to the Fred J. Kiesel Estate as its interest may appear, in so far as this action is concerned, because it is alleged in the complaint that the Kiesel estate did not have any interest in the insured property. The contention of counsel that plaintiff is seeking to recover on a different contract is entirely untenable, because the action was actually brought and prosecuted to a conclusion upon the policy that was actually written. The complaint shows that the action was based upon the policy as written and the policies which were the basis of recovery were introduced in evidence without objection by the defendant companies. There was no attempt to reform, and no reformation was necessary for the recovery as had. There is no contention on the part of the defendant companies that there was any fraud in the inception of the contract and the action was tried entirely on the contract as written by the agent of the companies. The court ruled that the issue made upon the allegations of plaintiff's complaint as to oral negotiations and the denial thereof were wholly immaterial and it was admitted by counsel for defendant that the same was wholly immaterialy. (Rec. 263-269).

In this connection we call attention to the statement of the court at the trial of the case in respect to the contention of plaintiffs in error under consideration:

The Court: If that provision in the policy is material we will have to reform the policy and my impression is that it is wholly immaterial if as a matter of fact the Kiesel Estate have no interest in it. (Rec. 269).

The Court: I shall sustain the objection, I may permit you to go into this in rebuttal if there is any contention on their part. (Rec. 270).

The cases cited by plaintiffs in error on the question of reformation are not in point, as no attempt was made to reform the policy in the instant case. In the case of Phoenix Insurance Co., vs. Wilcox & Gibbs Co., 65 Fed. 724, the court held that the evidence as to the intention of the agent and the previous verbal understanding was incompetent since in an action of law the court could only consider the actual terms of the contract.

And the court in its opinion further said:

“A policy as delivered and accepted is conclusively presumed in an action at law to express the entire contract of the parties.”

The record discloses that the court in the instant case only considered the actual terms of the contract. The other cases cited lay down the doctrine that was invoked in the instant case by the trial court that parol testimony is not admissible to vary the terms of a written contract.

The policy in question upon which the suit was brought does not state that the Kiesel Estate had any interest but merely provided that the policy was payable to said estate as its interest may appear and it appears that the Kiesel estate did not have any interest whatever in the premises and the judgment in harmony with the policy was in favor of the owner and the party insured.

The plaintiff could not properly join the Keisel estate, either as a plaintiff or defendant, the Keisel estate having no interest in the property. The courts make a distinction in policies that provide for the irrevocable payment in case of loss to a mortgagee and in policies where the loss is payable to a mortgagee or trustee as his interest may appear.

Burlington Insurance Company vs. Lowery, 61 Ark. 108; St. Paul F. & M. Ins. Co. vs. Johnson, 77 Ill. 598; Palmer Savings Bank vs. Insurance Company, 166 Mass. 189.

In the body of the policy it is provided:

“Loss, if any, on the building only, subject however to all the terms and conditions of this policy payable to assured and Fred J. Kiesel Estate, mortgagee.”

There is a slip attached to the policy which provides:

“Loss or damage, if any under this policy on building only shall be payable to Fred J. Kiesel Estate, mortgagee, or trustee as interest may appear.”



It is well recognized that the written or printed slips attached to a policy will control the provisions of the policy.

The provisions in the policy making the same payable to the Kiesel estate as its interest may appear, was by rider, and the rider of itself supersedes the policy, especially so where the obvious intention of the rider is to substitute all its conditions, exceptions and provisions for those of the policy.

Joyce on Ins. Vol. 1, Sec. 191 B.

New York & Porto Rico Steamship Co. vs.  
Aetna Ins. Co. 192 Fed. 212, affd. 204 Fed.  
255.

However if the mortgage debt has been paid the mortgagor may sue in his own name as the real party in interest.

II Enc. of Pleading & Practic 397;

Burlington Insurance Co. vs. Lowery, supra;

The only objection that the defendant could make in this case would be that there was a defect of parties plaintiff or defendant, or a nonjoinder of parties, and plaintiff alleges that the interest of the Kiesel Estate had ceased and that said parties did not or never had had any interest disposed of that question and left the plaintiff the real party in interest.

But a complaint on such policy, not making X, a paintiff, does not show on its face defect of parties

plaintiff, if it alleges that X's interest has ceased, though without showing whether it ceased by payment of the mortgage debt, by assignment of the mortgage, or otherwise.—Great Western Compound Company vs. Aetna Insurance Company, 40 Wis. Rpr. 373.

Quoting from the opinion of the Court, on page 376:

But if his interest in the property had ceased when the action was commenced, he was not a proper party either as plaintiff or defendant, and it is substantially alleged in the complaint that his interest therein had then terminated.—Great Western Compound Co. vs. Aetna Ins. Co., supra.

However technical distinction between actions at law and equity are abolished by act of Congress of March 3, 1915.

Mobile Ship Builders Co. vs. Fed. Bridge and Structure Co. 280 Fed. 292;

Chicago Bonding & Surety Co. V. U. S. for use of Frank Adams Elec. Co. 261 Fed. 266;

Collins vs. Bradley, 227 Fed. 199.

#### IV.

THE FAILURE OF THE PLAINTIFF TO GIVE WRITTEN PROOF OF LOSS TO THE COMPANY WITHIN SIXTY DAYS WAS WAIVED, AND THE INSURANCE COMPANIES BY THEIR ACTS AND CONDUCT ARE ESTOPPED FROM REQUIRING A STRICT COMPLIANCE WITH THE CONDITIONS

REQUIRING WRITTEN PROOF OF LOSS WITHIN SIXTY DAYS.

Immediately after the fire and on the same day, Enders notified Jackson, the local agent, that the Idanha Hotel had burned, and Jackson, at the time that he was so informed, told Enders that he would notify the insurers at once. (Rec. 271.) About a week thereafter, Jackson, the local agent, told Enders that he had received information from the company and that the adjusted would be at Soda Springs in a very short time, and adjust the matter, but did not know the exact date, but it would be soon. Enders did not see the adjusters when they were in Soda Springs. Enders stated that he did not know very much about insurance companies and on the 12th of June, 1921, went to Ogden, Utah, where he delegated W. H. Sherman to take up for him in his behalf the matter of adjusting the insurance and attending to it with the insurance companies. (Rec. 272.) Sherman, at the request of Enders, agreed to and did act for him in said matter and corresponded with Enders and reported to him orally from time to time the negotiations he had with the adjusters and on the 14th of June, he wrote to Jackson, the local agent at Pocatello, and on the 15th of the same month, received a letter from him (Exhibit 14) in which, among other things, Jackson stated that he would keep Sherman advised as the case progressed and that "There is nothing we can do at present." (Rec. 373.)

Sherman testified:

“Q. How long after the burning of the Idanha Hotel before you saw Mr. Enders?

A. A few days, I think about the 12th.

Q. And how long after that before you saw either Mr. Young or Mr. Croxford of Croxford & Young?

A. I can't fix that date exactly. I think it was along towards the end of the month, end of June, or prior to the end of June, but I am not certain.

Q. And where was that?

A. That was in their office in Salt Lake City.

Q. What did you go to see them in their office in Salt Lake City about?

A. About the adjustment of the loss on the Idanha Hotel.

Q. And at whose request did you go?

A. Mr. Enders' request.

Q. You were representing Mr. Enders there? You went as Mr. Enders' representative, to help him in settling it up?

A. I went because he asked me to go.

(Rec. 351-351.)

The first conversation between Sherman and Young was had before the end of the month of June, 1921. Sherman said:

“I went down to their office and I was under the impression that I saw Mr. Croxford there first, but as long as he was in Europe I certainly was mis-

taken, and who the man was that told me that Mr. Young had just been up there, or was making the adjustment, I don't remember. I know nearly all of them in that office. I thought it was Croxford. So then I talked to Mr. Young. Of course I was anxious to know all about it. I asked him what kind of a loss they had had, and he said it was a total loss, everything had burned to the ground, and I asked him what caused the fire, and then he stated to me he thought Enders had had a hand in it. He said that he had been there and found that Enders didn't have a very good reputation, that he was very heavily involved, that he had insured the building for more than it cost him, that he had said he owned it and he didn't have title, and that it was mortgaged, and that he was under the impression or he felt from his investigation that Mr. Enders had had a hand in burning down the building. I told him that I had known Mr. Enders several years, and that certainly surprised me, that nothing could make me believe that, no matter how hard up Mr. Enders was that he was the kind of a man that would do a thing like that. I told him that while Mr. Enders might not have title, he bought the building and had been in possession of it, and—”

(Rec. 353-354.)

An objection to the self-serving declarations made by Sherman was sustained, but the record discloses that all statements made by Young in the foregoing answer are in the record.



Further in the same conversation:

“Q. Did you advise them there that you came at the request of Mr. Enders?

A. Yes.

(Rec. 356.)

Q. State the conversation with reference to that part of it.

A. I told him that the transactions had been—had gone to the office of Fred J. Kiesel Company, and that we would be very glad to furnish them any documents or proofs or anything that they required.

Q. And what did he tell you?

A. He told me that if they needed anything that he would call upon me.

Q. What did he tell you with reference to whether he wanted anything then or not, at that time?

A. I don't think he asked me for anything at that time; I am not quite certain.

Q. Did he later call upon you for information?

A. Several times.

Q. Did you give them that information?

A. Yes, sir.

Q. But you did give them all the information they asked for?

A. I did, and they also asked me to get information from Mr. Enders, which I did.

Q. Did you communicate to Mr. Enders the result and the substance of your first interview with them there?

A. Yes.

Q. And did you communicate with him the substance of the letter you received from Mr. Jackson?

A. I think I did. I think I showed him that letter. . .

Q. You say they did call on you later for information and proof,—what was that?

A. Later Mr. Young asked me to give him a history of the entire transaction, and I looked through all our records, and remembering everything I could, I wrote Young & Croxford a complete history of the transaction, insofar as I could find anything or remember it

Q. Did they ask you for any information that required you to call upon Mr. Enders for anything after that.

A. Yes, they asked me to obtain from him a detailed account of his expenses, I think it was, in repairing the building, or making some repairs. Whether they had received a statement from Mr. Enders before and wanted me to confirm it or not, I don't know. I wrote to Mr. Enders and he sent me a statement, but it was written so badly and kind of scratched that I couldn't tell anything about it myself, and I sent it back to him and asked him to send me a statement I could read.

Q. Did you furnish them that statement?

A. Yes, sir.

Q. How long was that after the fire?

A. I think that was in the month of December?

Q. Now, after August 19th, did you have any conversations with them?

A. Yes, a good many.

Q. Where were those—in Salt Lake?

A. Some of them were in Salt Lake and some in Ogden.

Q. Yes, and they were with reference to this loss?

A. Yes, sir.

Q. Will you state what those were?

(Rec. 357, 358, 359.)

Q. How long did you continue to carry on negotiations with Croxford & Young?

A. Every little while.

Q. Up until when?

A. I think the last time I spoke to Mr. Croxford was in April of this year.

(Rec. 362.)

(Rec. 362.)

Q. Calling your particular attention to it, you have stated that they called on you for additional statements as to his expenses. Did they call on you for any other copies that weren't in your possession?

A. They requested that, and I wrote to Mr. Enders to get a copy of the deed and a copy of the letter of instructions, and either send them to me—I don't know whether he sent them to me or to them; think he sent them to me.

(Rec. 367.)

Q. And you furnished them to them?

A. Yes, sir.

(Rec. 368.)

Q. Do you recall about what time with reference to the date it was that they came to your office and inspected the files?

A. No, I can't. I was away most of the month of August, so that it must have occurred either in July or possibly September or October. I can't fix it definitely.

Q. Can you fix the time that you procured the copy of the deed from the Soda Springs Bank, through Enders?

(Rec. 369.)

A. I sent them the deed on November 9th.

(Rec. 370.)

Q. Now, Mr. Sherman, in your conversation with Mr. Young, on the 29th day of June, as you have fixed it, in their office, what was the last thing said between you or by Mr. Young to you with reference to this loss or furnishing proofs?

A. As I recollect it I offered to furnish any proofs or documents that we had, or to do anything they wanted me to, to help settle the matter, and Mr. Young said he didn't want me to do anything then, that he would call upon me when he did want something.

(Rec. 372.)

CROSS-EXAMINATION

Q. Did you state to Mr. Young that you represented Enders?

A. Yes, I told Mr. Young that I came down at Enders' request, he couldn't come.

Q. Now, when was that conversation?

A. I can't fix the date, Judge, but my recollection is that Mr. Young told me that he had just come back from Soda Springs, possibly a few days, I don't remember the date.

A. Well, I could fix it better by saying it was soon after Mr. Young returned from Soda Springs, whenever that was.

(Rec. 373.)

Q. And was that the extent of your offer at that time? To furnish him with any information that you had in your files?

A. Oh, no. I think I told him I would do anything he wanted me to do to straighten the matter out, give any information I could or do anything.

(Rec. 374.)

Q. He told you there was nothing at that time?

A. Yes, he didn't want me to do anything then. He said he would call on me later if—and he did do so.

(Rec. 375.)

Croxford & Young were the duly constituted adjusters of the defendant companies as appeared by Exhibit 18 and 19 which are letters from the managers of the in-



surance companies in which it is stated that Croxford & Young had the matter of this loss in charge.

(Rec. 286-287.)

On August 19, 1921, the British & Federal Fire Underwriters of the Norwich Union Fire Insurance Society, one of the defendants below, by its adjusters, Croxford & Young, wrote Enders stating that in the event he made claim under the policy from that company that he was requested to furnish them certain proof of loss as described in said letter. It was stipulated that a similar letter was written to Enders by each of the defendant companies.

Under date of August 21, 1921, Enders wrote the adjusters, stating that he was preparing the schedules requested and would forward them as soon as completed. And thereafter, on September 20, 1921, Enders furnished the statement as requested (Exhibit 16). The statements and proof of loss were retained by the insurance company and no objection in any manner made in respect to the same, either to Sherman or Enders.

Thereafter, on October 14th, 1921, Enders wrote the Star Insurance Company, one of the defendant companies, stating that he furnished to Croxford & Young on September 20, 1921, proof of loss, but had heard nothing regarding the same. (Exhibit 17.)

(Rec. 285-286-287.)

It was stipulated that a similar letter was sent by registered mail to each of the other defendant companies.

On October 28th, 1921, Enders received from the Star Insurance Company a letter stating that it had referred his communication to the adjusters Croxford & Young who would give the matter immediate attention and on November 1st, 1921, the Commercial Union Fire Insurance Company wrote Enders, acknowledging his letter and stated that they had referred his communication to Croxford & Young who had the matter in charge.

On October 19, 1921, the defendant below, British & Federal Fire Underwriters of London and Norwich, England, wrote a letter to Jackson (Exhibit 28), which reads as follows:

PLAINTIFFS EXHIBIT NO. 28.

“BRITISH & FEDERAL FIRE UNDERWRITERS  
OF LONDON AND NORWICH, ENGLAND, PACIFIC  
DEPARTMENT, 234 Sansome Street, San Francisco,  
Cal.

San Francisco, Cal., Oct. 19, 1921.

Mr. William H. Jackson, Jr.,  
Pocatello, Idaho,

CLAIM UNDER POLICY NO. 54277, ENDERS,

Dear Sir:—

I have for acknowledgement your letter of the 14th inst., in which you make inquiry as to the status of this

claim owing to the great length of time since the fire occurred.

I can only say that circumstances surrounding the case are very unsatisfactory with respect to the title as affecting the real property described in the policies of insurance.

The case is in the hands of the adjusters and will be dealt with upon its merits or demerits as may be shown by the facts in the case when they may be unravelled.

I can only say that we must await the result of our adjuster's further action in the matter.

Yours very truly,

J. L. FULLER,

Manager."

JLF/S

Lawrence C Young testified that he was a member of the firm of Croxford & Young, the adjusters referred to in this case and that prior to the 9th day of July, 1921, he went to Soda Springs, and inspected the premises.  
(Rec. 379-380.)

The facts and circumstances above set forth clearly operated as a waiver of the condition required in furnishing of a written proof of loss within sixty days and the insurance companies are estopped from requiring the enforcement of a strict compliance of said condition.

We direct attention to a recent decision of the Ninth Circuit. in the case of Twin City Fire Ins. Co. v. Stockmen's National Bank of Fort Benton, Montana, 261 Fed. 470, which is so similar in many respects to the facts in the instant case that we believe it is decisive in

favor of the defendant in error on the question of waiver and estoppel in regard to proof of loss. In this case it was held:

“Clauses in policies, prohibiting waiver unless indorsed thereon, refer only to provisions, which enter into the contract of insurance, and do not affect conditions which are to be performed after loss, as furnishing proofs of loss and giving notice.

Notice and proofs of loss may be waived by express words, or by conduct inconsistent, with intention to enforce strict compliance with the conditions therefor, and calculated to lead insured to believe insurer does not intend to require such compliance.

An adjuster, sent to adjust a loss, presumably has authority to waive proof of loss.”

The principles of law announced in this case are supported by both the Federal and State Courts.

In the case of *Knickerbocker Fire Ins. Co. vs. Norton*, 96 U. S. 689. 24 L. Ed. 234, from the syllabus:

“A declaration in a policy that the insurer’s agents had no power to make agreements or waive forfeitures, is only a notice to the assured, which the insured could waive and disregard at pleasure. A waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it.”

“Whether the insurer exercised such option or not is a fact provable by parol evidence, as well as by writing.”

“Whether such company had or had not authorized its agents to make such extensions, and whether an extension was made in a case, are questions for the jury.”

“A forfeiture may be waived as well by an agreement made for extending a premium note after its maturity, as by one made before.”

In the opinion, at Page 692, the court after reviewing authorities upon the question of waiver, makes the following pertinent statement:

“These cases show the readiness with which courts seized hold of any circumstances that indicated an election or intent to waive a forfeiture.”

On the question of waiver of proof of loss and estoppel, the cause of *Citizens Trust and G. Co. vs. Globe & Rutgers Fire Ins. Co.*, found in 229 Fed. 326, the court said:

“A policy of fidelity insurance issued to an insurance company on account of an agency required the assured to give immediate notice of any loss, or of facts indicating that loss had probably been sustained. The assured notified the insurer of a claim against the agency several months overdue, explaining that the delay in giving notice was due to its continued attempts to obtain settlement and



statement of the account. The insurer, without objecting to the notice also assisted in trying to obtain an agreement between the parties. Held that it thereby waived the conditions requiring immediate notice.

And in its opinion on Page 328 made the following statement:

“On this point the case, therefore, falls within the rule that any course of action which leads the assured to believe that by conforming thereto the condition of immediate notice will not be insisted upon, followed by labor or expense in the effort to conform, will operate as a waiver or estoppel. Insurance Company vs. Norton, 96 U. S. 234, 24 L. Ed. 689; Hartford Fire Insurance Co. v. Unsell, 144 U. S. 439, 12 Sup. Ct., 671, 36 L. Ed. 496; Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

The court makes the following observation in the case of Peit, et al. vs. German Ins. Co., 98 Fed. 800, at page 810, the court said:

“ ‘Is the demurrer of the defendant sufficient?’ Every question arising upon the demurrer in this case, in my judgment, would be more properly considered upon the trial of the case before a jury. The question as to whether the plaintiffs gave notice, as required by the contract of insurance, is a question of fact for the jury, under the instructions of the court. The statement of the plaintiffs is that notice was immediately given, and after the notice

was given the defendant sent its adjusters to investigate the fire, and that within the 60 days prescribed the plaintiffs rendered a statement of loss to the defendant, to which the defendant made no objection. This statement of the plaintiffs is possibly not as full as it might be. It does not state why written notice was not given. The presumption is that the plaintiffs deemed it unnecessary, for the reason that the defendant acted promptly, upon the verbal notice given it, by directing its adjusters to go and investigate the fire at once. If the defendant, as is alleged, had verbal notice of the loss, further notice would seem to be useless and unnecessary if the defendant company acted upon it. It is true that the policy requires that the notice should be in writing, but the defendant company must be held to have waived that stipulation of the contract when it acted promptly upon the verbal notice, and sent its adjusters to the place where the fire occurred to examine into the loss occasioned by the fire. It was, therefore, estopped in requiring a notice of the loss as provided for in the policy of insurance, and as to this objection the demurrer is overruled.

In the case of *Fisher v. Crescent Insurance Company*, 33 Fed. 544, it was held:

“Questions as to the sufficiency of proof of loss by fire of insured property, were waived by the examination of the premises by the company’s authorized agent, who investigated the loss and refused to pay it.”

“A stipulation in an insurance policy to give notice of loss, if any occurred, “forthwith” is satisfied by an immediate notice to a local agent, who transfers it in a short time to a general agent.”

In the case of *Hanover Ins. Co. v. Dallabo*, 274 Fed. 258, action was brought to recover on four Standard Michigan Fire Insurance Policies, containing as near as we can ascertain from the decisions similar conditions as provided in the policies in the instant case. The Court in passing upon the question of waiver of the conditions relied upon in said case said:

(2) “The Insurance Company may, however, waive any provisions in a policy for its protection, including even the provision that the waiver must be indorsed upon the contract itself. *Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Ins. Co. v. Rad-din*, 120 U. S. 183-196, 7 Sup. Ct. 500, 30 L. Ed. 644; *Assurance Co. v. Building Ass’n.*, 183 U. S. 308-352, 22 Sup. Ct. 133, 46 L. Ed. 213. If, therefore, this insurance company during the terms covered by these policies, with full knowledge of the facts, separate and apart from the knowledge of the agent, waived these provisions, or by its acts and conduct after it acquired such knowledge, has, in good conscience and fair dealing, estopped itself from asserting the failure to comply therewith as a defense to this suit, then the question of the agents’ knowledge or authority to waive conditions or the manner in which such waiver must be evidenced wholly disappears from this case.

In the case of Northern Assurance Co. v. Building Ass'n, *supra*, the Supreme Court qualified the declaration that "mere knowledge by the agent—will not affect the company" with the statement "unless it is affirmatively shown that such knowledge was communicated to the Company."

(3) The contention of plaintiff in error that the court erred in overruling its motion for a directed verdict is based solely upon the ground that the knowledge of the local agent that these buildings were on leased property, and that there was a chattel mortgage upon the property insured, does not affect the company or charge it with knowledge of these facts in the absence by a written waiver by such local agents indorsed upon these policies. These contracts are Michigan contracts, and it would appear that the Supreme Court of Michigan has announced a different doctrine. *Richards v. Insurance Co.*, 60 Mich. 420, 27 N. W. 586." and other citations.

It will be observed that the Court in the above case followed the rule announced in the Michigan Supreme Court.

Section 5008 of the Idaho Compiled Statutes provides as follows:

"All insurance covering persons or property in this state must be written in companies authorized to transact business in this state, and only through their licensed agents; and all such insurance, excepting life insurance, must be written only through

licensed agents residing within this state; PROVIDED, That the provisions of this section shall not apply to policies of reinsurance.

Section 5053, Idaho Compiled Statutes provides as follows:

“5053. FIRE INSURANCE POLICY STANDARD FORM. No fire insurance company, except county mutuals, shall issue any fire insurance policy covering on property or interest therein in this state, other than on the form known as the New York standard, as now or may be hereafter constituted, except as follows:

1. A company may print on or in its policy its name, location and date of incorporation, plan of operation, whether stock or mutual, and if mutual whether on cash premium or assessment plan; and if it be a stock company, the amount of its paid up capital stock, the names of its officers and agents, the number and date of the policy, and, if it is issued by an agent, the words, ‘This policy shall not be valid until countersigned by the duly authorized agent of the company at ———.’ ”

Then follows in said section certain other exceptions which are not pertinent to the instant case. This law was enacted in 1913 and compiled and re-enacted in 1919 and was in force at the time the policies in this case were written:

Under this section of the statute it became the duty of the local agent to write and countersign the policies



issued within the state of Idaho, in order to comply with the statutes, the contract in question is an Idaho contract.

In the case of *Theriault v. Cal. Ins. Co.*, 27 Ida. 476, 149 Pac. 719, the Court on Page 721 of the Pac. says:

“Regardless of the clause in a policy that no officer agent, or other representative of the insurance company shall have power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent, authorized to adjust a loss, the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss.”

So, in *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848, it was said:

“When Appellant’s adjuster in response to appellee’s inquiry that he had all the proof he wanted this was a waiver of any further proof of loss on the part of the appellant, notwithstanding the non-waiver agreement.”

So, in *Twin City Fire Ins. Co. v. Stockmen’s National Bank*, *supra*, decided by this court, it was said:

“The adjuster sent to adjust the loss presumably has authority to waive a proof of loss.”

In the case of *Firemen’s Insurance Company vs. Hays, et al.*, (Ark.) 251 S. W. 360, an action was brought to recover upon a fire insurance policy issued

to Hays and containing a loss payable clause in favor of Wilkinson & Carroll Cotton Company, as its interests may appear. Reversal of the case on appeal was sought among other things on the ground that no proof of loss was furnished by the insured or the mortgagee. Immediately after the fire the insured orally notified the local agent, and the Cotton Company, the mortgagee, likewise notified the local agent of the amount due it under the policy. The local agent had power to issue policies and collect premiums and it had issued the policy in question and collected the premium thereon. When the local agent received oral notice it notified the mortgagee, the Cotton Company, that the premium had not been paid and stated in a letter that it was necessary to have a competent contractor make an estimate on the cost to replace the building. Later the local agent notified the mortgagee that its representative, Martin, had made two unsuccessful trips to see Hays, the insured, for the purpose of obtaining information to report the loss and that Martin had visited the premises and observed the property destroyed and at that time made a request upon the Cotton Company that if it would obtain an estimate of the cost to rebuild the property and report the same to the company an endeavor would be made to place the matter in line for adjustment. The Cotton Company furnished such information and received a reply from the local agent stating that the information had been forwarded to the adjuster, who had charge of the settlement and that the adjuster had been to the scene

of the fire and could not find anyone that had lived in the house that could give him any information. The insurance company had employed an independent adjuster to investigate the loss, who examined the correspondence between the local agent and the Cotton Company and obtained the estimate furnished by the Cotton Company to replace the building. The adjuster was unable to find Hays, the insured, and made no further effort to obtain from the insured or the mortgagee any further information.

The court in passing on this matter said:

“We think the correspondence led the mortgagee to believe that appellant would adjust the loss and make a settlement without the necessity of making formal proof of loss under the loss clause in the policy. Appellant, through its agent, requested an estimate of the cost of replacing the building, from the mortgagee, accepted and placed same in the hands of its employed adjuster. The agent had the authority to make the request for and receive the estimate, for it had power to issue policies and collect premiums. By vesting this authority in its agent, appellant conferred apparent authority upon said agent to adjust losses and waive proof of loss.”

Citing other cases.

On August 19, 1921, each of the defendant insurance companies, by their duly constituted adjusters, wrote Exhibit 14, which is as follows:

Croxford & Young.

Adjusters of Fire Losses

302-3 Ness Building,

Salt Lake City, Utah, August 19th, 1921.

Mr. Theo. Enders,

Soda Springs, Idaho.

Dear Sir:

In the event you make claim under Policy No. 54277 of the British & Federal Fire Underwriters of Norwich, England, for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, you are hereby respectfully requested to comply with all the terms and conditions of said policy contract, and your especial attention is called to that portion of same recited in lines 70 to 76 inclusive, reading as follows, to-wit:

“Within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building

herein described and the several parts thereof were occupied at the time of the fire.”

Yours truly,

BRITISH & FEDERAL FIRE UNDERWRITERS.

Y/JHB

By CROXFORD & YOUNG,  
Adjusters.”

“Registered.”

It will be observed by this letter that the defendant insurance companies had knowledge at the time it was written that there had been no formal proof of loss furnished within sixty days as prescribed by the policy, yet each of said companies made a request therefor. The information requested in said letter, being a sworn statement of proof of loss, was furnished by Mr. Enders, which proof of loss was retained by the companies without any objection on the part of the defendants below.

This request was in effect an extension in writing of the time within which to furnish proof of loss. If it was not so intended, for what purpose was it written?

Either it should be construed as an extension of time or that the companies intended to waive the strict provision of the policy as to the formal proof of loss as stipulated in the policy. It clearly shows that the insurance companies recognized by this act the continued validity of the policy and intended to negotiate further with Enders with respect to adjusting the loss. This is particularly true in this case in view of the subsequent dealings and negotiations that occurred. Furthermore,



it is evident from the fact that the only objections upon which the insurance companies were basing their delay in settling the matter as appears by the record was the condition of the title, value of the property, and the origin of the fire. In this connection, we call attention to the letter written by one of the companies, Exhibit 28, in which it is said that the "circumstances surrounding the case are very unsatisfactory with respect to the title of the real property described in the policies of insurance, but that the matter is in the hands of the adjusters, and it will be dealt with upon the merits or demerits as shown by the facts in the case when they are unravelled.

In the case of Carpenter, etc., vs. German-American Insurance Company, (N. Y.) 31 N. E. 1015, it was said:

"We think, also the insistence of the company upon the right to examine the plaintiff under oath, on matters relating to the loss, made in the letter of February 20th, 1884, and their subsequent examination by the defendant, was a waiver of any objection founded on the delay in serving proof of loss. It is claimed that the demand contained in the letter was conditioned upon the assent of the plaintiffs; that such examination should not be construed as a waiver by the company of the objection. The letter is, at least, equivocal. The plaintiffs could not safely refuse to submit to an examination, and the letter does not state that the company would dispense with the examination in case the plaintiffs did not acquiesce in the condition. The points as

to the proof of loss, and the exception of the defendant based thereon, are not, we think, tenable.”

So in the case of Cannon v. Home Insurance Company, Wis.) 11 N. W. 11. In this case there was a breach of condition on account of the obtaining of subsequent insurance. After the Insurance Company had knowledge of such breach, it wrote in answer to a letter from the assured’s attorney, that if the assured had a fair and legal claim he should make out such proof as the policy required and send them here and on receipt of the same the claim should be investigated and the attorney promptly advised of the insurer’s views. Thereupon the plaintiff replied and made out proof of loss at an expense, paid his attorney, besides losing time and some personal expense incurred in traveling, thereafter correspondence occurred between the parties as to the liability of the defendant, the court said:

“The proposition upon which counsel rely is this: That a party cannot occupy inconsistent grounds or positions; that one who relies upon the forfeiture of a contract cannot, at the same time, treat the contract as an existing, valid one, nor call upon the other party to the contract to do anything required by it. Or to apply the proposition to the precise facts in the case that as the defendant, in its correspondence with the attorneys of the plaintiff, after full knowledge of the forfeiture, saw fit to call for additional proofs of loss, recognizing by this act the continued validity of the policy, it required the assured to give immediate notice of any loss, or of

facts indicating that loss had probably been sustained. The assured notified the insurer of a claim against the agency several months overdue, explaining that the delay in giving notice was due to its continued attempts to obtain a settlement and statement of the account. The insurer, without objection to the notice, also assisted in trying to obtain an agreement between the parties. Held, that it thereby waived the condition requiring immediate notice.”

And in its opinion on Page 328 made the following statement:

“On this point, the case, therefore, falls within the rule that any course of action which leads the assured to believe that by conforming thereto the condition of immediate notice will not be insisted upon, followed by labor or expense in the effort to conform, will operate as a waiver or estoppel. *Insurance Company v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Hartford Co. vs. Unsell* 144 U. S. 439, 12 Sup. Ct., 671, 36 L. Ed. 496; *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 303, 22 Sup. Ct. 133, 46 L. Ed. 213.

“It may be asserted broadly that if in any negotiation or transaction with the insured after the knowledge of the forfeiture, it recognizes the continued validity of the policy or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense the forfeiture is as a matter of law waived; and it is now settled in this court after some differences of opin-

ion that such waiver need not be based upon any agreement or an estoppel.”

Allen et. al. v. Vt. Mutual F. Ins. Co., 12 Vt. 366;

Webster v. Phoenix Ins. Co., 36 Wis. 67;

Comm. F. Ass. Co. v. Haucking, Sec. 6 Cent. Reports, 915; 115 Pac. 407;

Martinson v. I. N. British & Marine Ins. Co. 7, West Reports, 637; 64 Mich. 635;

German F. Ins. Co. v. Grunert, 112 Ill. 69;

Gaines v. St. P. F. & M. Ins. Co., 43 Wis. 109.

The rule of law is that the insurer must treat the policy in force in all respects or treat it as invalid in all. If any part of the policy is valid it is all valid, and the insurers in this case, by calling upon Enders to furnish them with a copy of his deed and to furnish them with an itemized list of all of the expenditures made in the repair of the hotel, when they were aware of the fact that more than sixty days had elapsed since the date of the fire were of course proceeding under the policy, and were calling for something that they were bound to call for under the contract with Enders, and in so doing recognized the contract as a valid and subsisting one at that time, and the insured having complied with their request at expense and inconvenience on his part complied with the companies' request and the failure to file proof of loss within sixty days was thereby waived.

Roby v. Am. Cent. Ins. Co., 120 N. Y., 510, 24 N. E. 808;

Pratt v. Ins. Co., 130 N. Y. 206, 29 N. E. 117.

“If the silence of the insurers at the time of the receipt of the proof, subsequently, however, accompanied by other acts or conduct on their part which might fairly lead the claimant to believe that the company still regarded the contract to be in force and binding, this will operate as a waiver of the delay in furnishing the proof.”—Joyce on Insurance, Sec. 3367, pp. 5586.

“From a consideration of the principles applicable in cases of waiver and estoppel, we think the following rule may be deduced as to the effect of demanding proofs of loss. If the insurer demands proofs of loss, or additional proofs, and he has actual knowledge or it clearly appears from the circumstances of the case that at the time of making the demand the insurer has knowledge of the facts that some condition or warranty of the policy has been violated or that for any reason the policy has been forfeited and the insured complies with such demand, at considerable time, trouble and expense, the demanding of such proofs will estop the insurer from subsequently relying upon such breach as a defense to an action on the policy.”—Joyce on Insurance, Par. 3369, pp. 5589.

The record discloses that in the month the fire occurred Mr. Shearman who was acting for Mr. Enders, in conversation with Mr. Young, one of the adjusters for the company, was told by Young at that time that there had been a total loss; everything had burned to



the ground; that he thought Enders had a hand in it and that he had been on the ground and found that Enders did not have a very good reputation; that he was very heavily involved; that he had insured the building for more than it had cost him, and that Enders had said he owned the property, but didn't have title, and that it was mortgaged and from his conversation he was under the impression that Enders had a hand in burning down the building. This statement on the part of Young at that time naturally conveyed the impression to Shearman that the insurance companies would resist the payment of the insurance on the ground of incendiarism, lack of title and over-insurance, and fraud. The statement was of such character as to lead Shearman to believe that there would be no defense made on any technical ground of failure to furnish proof of loss, especially in view of the fact that Young at said time stated to Shearman that if he needed anything he would call upon him but that there was nothing he could do at present. These facts and circumstances naturally lulled Shearman into a sense of security that no technical advantage would be taken but that all he would need to do would be to wait for further requests from the adjuster. These facts, taken in connection with the fact that subsequently, after the sixty day period had lapsed, a request was made for the furnishing of a written proof of loss, detailing all the requirements mentioned as to title, value of property, ownership and the furnishing of the same, together with the furnishing of other data,

the deed in question and list of the expenses of repairs, clearly constituted a waiver on the part of the company of the strict enforcement of the provision of the sixty-day clause, and it must be borne in mind further that these negotiations were carried on until April of the following year and that in the interim the insurance companies said that the claim would be settled on its merits. These facts and circumstances estopped under the authorities cited, the insurance companies from demanding a strict enforcement of the clause requiring proof within sixty days.

In the case of *S. Idaho Conf. Ass'n vs. Hartford Insurance Company*, 31 Ida., 135, the court in passing upon the question of failure to give notice of proof of loss, said:

“When the property was destroyed by fire under conditions which by the terms of the policy did not render it void, the liability of the appellant company accrued. A contract of insurance is not unilateral, as that term is generally used, for the insured has paid a consideration therefor. The provision that if a fire occurs the insured shall within sixty days after the fire, unless such time is extended in writing by the company, render a statement to the company containing the required proof of loss, has no reference to any condition or stipulation affecting the risk itself, but is a provision requiring an act to be performed after the liability has accrued.

We think if this provision be construed to contain a condition precedent to the right to recover on

the policy, a failure to conform to it would result in a forfeiture of a legal right. The provision is therefore to be strictly construed against the company. It does not in terms provide that the penalty for failure to furnish proof within sixty days shall be a forfeiture of the right to recover. Neither does the provision that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required shall have been received by the company" contain the further restriction that such proof must be received within sixty days after the fire. The time within which proof of loss is to be submitted is not made the essence of the contract when strictly construed against the company. We hold that the failure to submit proof of loss within sixty days is not fatal to this action.

The question of waiver, which was argued at considerable length, become immaterial, as well as other errors assigned by appellant."

The above case was decided in 1917 and the policies sued upon were written April, 1921, so that at the time said contract was entered into the law of the State of Idaho was in force as announced in the above decision.

The pleadings in the instant case are sufficient to support the judgment.

Idaho Compiled Statutes 1919; Section 6707.

In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally

construed with a view to substantial justice between the parties.

The *Mode vs. Myers*, 30 Idaho 165, 164 Pacific 91, it was held: Where a material fact is only stated inferentially and pleading is not properly demurred to for this season, it is good after judgment.

*McCormick Vs. Smith*, 23 Idaho 487, 130 Pacific 999, it was held: A pleading should be so construed as to allege all of the facts that can be implied by fair and reasonable intendment from the facts expressly alleged.

There was no demurrer, either general or special, filed to the amendments to the complaint, and the same were allowed by the Court without objection by the defendant companies below, and no objection can now be taken in this Court to any defect therein.

## V.

THERE WAS NO VIOLATION OF THE OCCUPATION WARRANT BY REASON OF THE LAUNDRY BEING ON THE PREMISES.

With reference to the contention that there was a commercial laundry in the building and the policy was avoided for that reason, we call the Court's attention first to the fact that the pleadings of the plaintiffs in error did not affirmatively allege or set up by way of special defense, the conditions in the policy with refer-

ence to said matter, not having pleaded such contentions it could not at the trial nor now be heard to complain upon that ground. In the insured's proof of loss Enders advised the insurance company that certain of the rooms of the hotel were used by Mrs. Hart for a laundry and the defendants were advised of this fact before the action was commenced herein, and made no defense on that ground of any kind and having so failed to plead such defense have thereby waived the same.

19 Cyc. 1927-1928.

Further in this connection we call your Honor's attention to the fact that while it is true in answer to a question on cross-examination if the laundry was a commercial laundry, Enders said "Yes," but it was very evident from his testimony that he did not know the meaning of the term "Commercial Laundry" and later explained this answer.

"Q. You may describe how this laundry was used, that was in the building.

A. Why, to do our washing for the hotel, and the woman does the washing for the house.

Q. And was there any other washing done other than the washing that was required for the hotel purposes?

A. The hotel people, they gave them laundry. If you were there and wanted your shirt washed you would take it to the laundry, and of course get the extra money for it."



Q. What kind of a laundry did you have in the hotel?

A. Oh, just a woman doing the washing there, and maybe her boy helped her.

Q. And did she take in people's washing?

A. Well, she—the people, you know, in the hotel—you go in the hotel, and they say, "Here, can you wash that shirt for me."

THE COURT: Did she take in washing from the outside?

A. I guess she would take in a little once in a while, you know.

MR. JONES: Q. Where was the principal linen for laundry work obtained?

A. From the hotel."

(Rec. 344-345.)

While this testimony was incompetent, it was finally submitted to the jury and the jury found in favor of Mr. Enders.

Subdivision D2 of the policy insures furniture, fixtures and supplies, laundry machinery and apparatus. It is a recognized fact that hotels and apartment houses the size of the building in question almost without exception operate a laundry, which is not a commercial laundry.

We have considered all the assignments of error which have been discussed in the brief of plaintiffs in error. There are other assignments of error men-

tioned, but inasmuch as the plaintiffs in error have not discussed the same except as some of them are involved in the general discussion of the errors relied upon we take it that they have abandoned the same. We desire, however, in passing, to suggest with reference to error No. 9, that the record discloses that no objection was made to the admission of the deed in question. However, it was admissible under sections 7968 and 7969, Idaho Compiled Statutes, which are, respectively, as follows:

“Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgement or proof of conveyances of real property, and the certificate of such acknowledgement or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property.”

“Every instrument, conveying or affecting real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgement or proof, be read in evidence in an action or proceeding, without further proof;—”

In conclusion, we submit that there is no reversible error in the record and that the judgment of the lower court should be affirmed.

Respectfully submitted,

B. W. DAVIS,

D. W. STANDROD,

T. D. JONES,

Counsel for Defendant in  
Error.

IN THE <sub>3</sub>  
United States  
Circuit Court of Appeals

For the Ninth Circuit

---

ALLIANCE INSURANCE COMPANY, BRITISH &  
FEDERAL FIRE UNDERWRITERS of THE  
NORWICH UNION FIRE INSURANCE SOCI-  
ETY, COMMERCIAL UNION ASSURANCE  
COMPANY, LIMITED, and STAR INSURANCE  
COMPANY OF AMERICA, Corporations,

*Plaintiffs in Error,*

*vs..*

THEODORE ENDERS,

*Defendant in Error.*

---

Reply Brief for Plaintiffs  
in Error

---

Geo. F. Shelton, Butte, Mont.

Finis Bently, Pocatello, Idaho.

Howard Toole, Missoula, Mont.

Brice Toole, Butte, Mont.



IN THE  
United States  
Circuit Court of Appeals

For the Ninth Circuit

---

ALLIANCE INSURANCE COMPANY, BRITISH &  
FEDERAL FIRE UNDERWRITERS of THE  
NORWICH UNION FIRE INSURANCE SOCI-  
ETY, COMMERCIAL UNION ASSURANCE  
COMPANY, LIMITED, and STAR INSURANCE  
COMPANY OF AMERICA, Corporations,

*Plaintiffs in Error,*

*vs.*

THEODORE ENDERS,

*Defendant in Error.*

---

Reply Brief for Plaintiffs  
in Error

---

Geo. F. Shelton, Butte, Mont.

Finis Bently, Pocatello, Idaho.

Howard Toole, Missoula, Mont.

Brice Toole, Butte, Mont.



## REPLY BRIEF

This reply brief is filed with the permission of the court and we deem it advisable to file it in order to meet two of the questions raised by defendant in error in his brief and on argument before the court.

We maintained in our original brief that this cause should not have gone to the jury for the reason:

1. That there was no evidence in the record to show sole and unconditional ownership in Enders of the premises insured and that there was no evidence that he owned in fee simple the land upon which the insured building stood.

2. That misrepresentation by Enders as to the condition of his title and as to the nature and character of the encumbrances thereon avoided the policy and precluded a recovery.

We shall consider these matters here in the same order, our purpose being, however, to meet the contention of counsel for defendant in error as it appeared in his brief and on argument.

### I.

We do not propose to here discuss the question as to whether or not the vendee in possession of premises under an executory verbal contract for the sale of real estate is sole and unconditional owner within the provisions of a standard fire insurance contract as the law in that connection has been cited to the court in both original briefs, nor shall we here discuss the question as to whether or not a verbal escrow agreement is sufficient but we do insist that no agreement existed in this

case which bound the Natural Mineral Waters Company to sell or Enders to buy the property in question.

In his brief, and on argument, counsel for Enders quoted from the record certain portions of the evidence upon which he claimed a binding contract was founded and we deem it necessary to call the court's attention to the fact that full examination of the record discloses such a complete break in the negotiations that no agreement whatsoever could have been in existence and that there was nothing upon which a jury could pass.

In the first place Enders relies, for evidence of transfer, upon a quit-claim deed (record p. 493) executed by Natural Mineral Waters Company by Mr. Clark as president and delivered to the Soda Springs Bank for delivery to Enders upon payment of \$4000.00. The only written instructions accompanying the deed are two letters (record p. 323) neither of which could in any manner bind Enders. At the most they gave him the privilege of purchasing.

In support however of his theory that there was an oral agreement to supplement the deed and letters, counsel for Enders relied upon testimony of an oral agreement (record p. 220-236-237) between Enders and Mr. Kiesel acting for the Natural Mineral Waters Company during 1919. These oral negotiations are supplemented by letters written in September, October and December, 1917, by Mr. Kiesel to Mr. Enders. (record p. 491-492).

Up to this point the negotiations went forward in some order but in April, 1919, Mr. Kiesel died and

Shearman took up his affairs. However the only deed which was prepared pursuant to these negotiations was never signed (record p. 238-240) and we invite the Court's particular attention to this fact. (See also Plaintiff's Exhibit 8, record p. 496).

Subsequently and after Mr. Kiesel's death negotiations were again opened by Shearman (record 236-7) and once Mr. Clark himself talked with Enders (record 240-250), whereupon a second deed was prepared and forwarded to the Soda Springs Bank with the letters hereinabove referred to and found on page 323. Here again we particularly invite the Court's attention to the fact that these letters had no binding effect upon Enders.

As we have stated before in this brief Enders relies upon this second deed as his evidence of title, but on October 12, 1920, after this deed was made, Mr. Shearman forwarded Enders a written escrow agreement accompanied by a letter requesting him to sign (record p. 332). On October 12 (record p. 333) he again wrote Mr. Enders asking that the contract be signed. On October 26, 1920, Enders replied (record p. 333) explaining his failure to sign the contract.

Enders in his testimony (record p. 324 and 325) denies that he ever received this contract but upon being pressed (record p. 334) admits having received the contract but states he did not sign it. Later when asked by the Court why he did not sign (record p. 343) he gave as his reason that the contract did not correspond to his understanding with Mr. Kiesel.

The first deed and the oral negotiations with Mr. Kiesel were one transaction and the second deed and written contract another transaction neither of which was ever consummated. The negotiations with Mr. Kiesel terminated in a deed which was never signed and the negotiations with Shearman and Clark terminated and were ineffective to bind anyone when Enders refused to sign the accompanying written contract. The incomplete quality of the whole transaction is shown by the result, for Enders, from the date of the first negotiation to the present time, has never paid one cent of the alleged purchase price.

It cannot under any interpretation be said that Enders was unconditional and sole owner of these premises and certainly something more definite must exist than can be found here before he can be vested with fee simple title to the land.

The Court has been cited in our original brief to the law in these connections and we will not cite further cases here.

We respectfully submit that there was nothing here upon which a jury was entitled to pass and our motion for a nonsuit on this ground should have been sustained.

## II.

The second point which we raise here is that of misrepresentation by Enders.

The policies of insurance contain this provision:

“This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circum-



stance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss."

The policy of insurance issued to Enders on the 27th day of April, 1921, carried an endorsement in favor of the Fred J. Kiesel estate mortgagee, as interest may appear and also the following clause:

"Loss if any on building only, subject however, to all the terms and conditions of this policy, payable to Fred J. Kiesel Estate, mortgagee and assured";

and the policies also contained the usual provision for unconditional and sole ownership and fee simple title in the assured.

These policies were procured at the request of Mr. Enders and upon delivery to him constituted the contract between the parties (Syndicate Ins. Company vs. Bohn, 65 Fed. 165). Subsequently on September 20th, 1921, after the fire, defendant in error submitted final proof of loss sworn to by him (record p. 281) in which he stated that the Kiesel Estate has and holds an interest in the said property in the sum of \$5400.00 and that there were no other encumbrances thereon. Subsequently in paragraph four of his complaint (record p. 14) he stated that the Fred J. Kiesel Estate was not the mortgagee or trustee of said property and did not at the time the policy was issued or at any time thereafter have any interest whatever in the said property and



that the proceeds due under the policy were due and payable to him, Enders, and that he was the only party interested in the same.

At the trial Mr. Enders testified (record p. 322) that the Kiesel Estate had no interest in the property and that the clause in the proof of loss should have read Natural Mineral Waters Company.

The proof throughout the entire record, of course, shows that the Natural Mineral Waters Company to the very last owned a paramount equitable interest in the property to the extent of \$4000.00.

Counsel for the defendant in error takes the position that these statements and representations by Enders are immaterial and that an intention to defraud must be present before the clauses in the policy against misrepresentation become operative.

It is our position that the insurance companies were and are entitled to a fair statement from the insured as to the condition of the title and that any substantial misrepresentation materially affecting the risk is a breach of the contract which avoids same and that these representations and statements of Enders hereinabove mentioned were material to an important degree and that inasmuch as there is no conflict in the evidence or testimony the court below should not have submitted the case to the jury.

The materiality of these statements is evident. Enders insured the property and made the loss payable to the Kiesel Estate, which of course would be proper if the Kiesel Estate had had an interest and which would

not effect the policy if the Kiesel Estate had no interest and Enders was the sole and unconditional owner with no other encumbrances on the property. However there was another important and paramount outstanding interest in the Natural Mineral Waters Company and the title to the premises was in such condition that the insurers were entitled to be appraised of this fact.

The Colombian Ins. Co. of Alexandria vs.  
Joseph Lawrence, 2 Peters, 25.

Syndicate Ins. Company vs. Bohn, 65 Fed.  
165.

If it is true as Enders stated at the trial that the Natural Mineral Waters Company was intended to be included in place of the Kiesel Estate then Enders' misrepresentation as to the condition of the title has actually deprived the plaintiffs in error of their rights of subrogation. No right of subrogation could arise, as stated by the court below, if the Kiesel Estate had no interest or if its interest had expired, but if through misrepresentation the interest actually intended to be insured by Enders had not expired but was in the name of the Natural Mineral Waters Company then the right of subrogation would be coexistent with the interest and would be lost to the insurance companies by reason of Enders misstatements of fact.

Counsel relies to some extent upon the fact that Enders was an uneducated man and not familiar with the ins and outs of an intricate business transaction such as is included in an insurance contract but it must be said in this connection that Enders was operating two

hotels and conducting a livestock business and should not be permitted at the expense of the insurance companies to benefit by his own ignorance.

The net result of the misrepresentations by Enders of the actual facts with relation to his title and the encumbrances thereon is that he has recovered judgment upon policies of insurance covering a building for which he has never paid one cent and upon which the paramount outstanding interest is still in the hands of another.

We have cited the cases which we deem important in this connection in our original brief and will therefore not call them to the attention of the Court again here, but we respectfully urge that the testimony shows a misrepresentation and concealment of material facts and circumstances concerning the subject of the insurance and that the interest of Enders in the property was not truly stated by him and that by reason of the fact that none of this testimony or evidence was contradicted or controverted the matter should not have gone to the jury and the trial court erred in denying motion for nonsuit and directed verdict.

Respectfully submitted,

GEORGE F. SHELTON,  
WHITE & BENTLY,  
HOWARD TOOLE,  
Attorneys for Plaintiffs in Error.

Service of the foregoing brief accepted and receipt  
of copy acknowledged this..... day of.....,  
1923.

.....  
.....  
Attorneys for Defendant in Error.

IN THE *J*  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

F. O. MCGILL AND H. W. KINNEY,

*Appellants.*

VS.

OREGON SHORT LINE RAILROAD COMPANY,  
a Corporation,

*Appellée.*

---

**Transcript of the Record**

---

*Upon Appeal from the District Court of the United  
States for the District of Idaho, Southern  
Division.*





No.....

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

F. O. MCGILL AND H. W. KINNEY,

*Appellants.*

vs.

OREGON SHORT LINE RAILROAD COMPANY,  
a Corporation,

*Appellee.*

---

**Transcript of the Record**

---

*Upon Appeal from the District Court of the United  
States for the District of Idaho, Southern  
Division.*

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

---

G. W. LAMSON,  
Nampa, Idaho,  
*Attorney for Appellants.*

H. B. THOMPSON,  
Pocatello, Idaho.  
*Attorney for Appellee.*

# INDEX

---

	Page
Amended Complaint .....	7
Answer to Amended Complaint.....	65
Assignment of Errors.....	74
Citation .....	75
Clerk's Certificate.....	77
Decree .....	71
Exhibit "A" .....	23
Exhibit "B" .....	26
Exhibit "C" .....	32
Exhibit "D" .....	36
Exhibit "E" .....	41
Exhibit "F" .....	43
Exhibit "G" .....	52
Exhibit "H" .....	54
Exhibit "I" .....	58
Exhibit "J" .....	60
Motion to Dismiss.....	63
Motion for Temporary or Preliminary Injunction .....	61
Names and Addresses of Attorneys of Record..	4
Notice of Appeal.....	73
Praecipe .....	74
Temporary Injunction.....	63





OREGON SHORT LINE	)	
RAILROAD COMPANY,	)	
a Corporation,	)	No. 998
<i>Plaintiff.</i>	)	AMENDED
vs.	)	COMPLAINT
F. O. MCGILL and	)	In Equity.
H. W. KINNEY,	)	
<i>Defendants.</i>	)	

The Oregon Short Line Railroad Company, a corporation, brings this its amended bill of complaint against F. O. McGill and H. W. Kinney as defendants, and respectfully represents and shows:

That the plaintiff now is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and had at all of said times complied with the laws of the State of Idaho relative to foreign corporations doing business therein.

That on or about the 15th day of December, 1918, the defendant F. O. McGill subscribed and

swore to a certain document in writing designated a "Mechanic's Lien," and caused the same to be filed for record in the office of the County Recorder of Canyon County, Idaho, on the 16th day of December, 1918, copy of which said writing is attached to the original complaint filed herein, marked Exhibit "A," and made a part hereof by reference.

### III.

That thereafter the defendant McGill subscribed and swore to an amended complaint, in an action wherein F. O. McGill, "doing business under the firm name and style of McGill Construction Company," was plaintiff, and William G. McAdoo, Director General of Railroads, was defendant, copy of which is attached to the original complaint filed herein, marked Exhibit "B," and by reference made a part hereof, which said amended complaint said defendant McGill caused to be filed in the office of the Clerk of the Seventh Judicial District Court of the State of Idaho, in and for Canyon County, Idaho, January 2nd, 1919, and procured a summons to be issued thereon out of said court, and said summons and complaint were on the 3rd day of January, 1919, served on the said defendant William G. McAdoo, Director General of Railroads, by delivery of a copy thereof to the station agent employed by

said defendant in charge of the depot and station on the line of the Oregon Short Line Railroad at Nampa, in Canyon County, Idaho; that the said Oregon Short Line Railroad Company, plaintiff herein, was not made a party to said action, and was not served with summons or other process, and never became a party thereto, and jurisdiction of said Oregon Short Line Railroad Company in said action was never attempted to be obtained, or obtained in fact.

#### IV.

That thereafter, and within the time required by law, the said William G. McAdoo, Director General of Railroads, defendant in said action, appeared by his attorneys, and served and filed an answer to said amended complaint, copy of which is attached to the original complaint filed herein, marked Exhibit "C," and made a part hereof by reference.

#### V.

That said cause came regularly on for trial and the court, after receiving the proof of the respective parties, and after argument of counsel, and being advised in the premises, made and filed its findings of fact and conclusions of law, copy of which is attached to the original complaint filed herein marked Exhibit "D," and by reference made a part hereof.

## VI.

That at the time of signing and filing said findings of fact and conclusions of law, the judgment of the court was duly signed and filed, copy of which is attached to the original complaint filed herein, marked Exhibit "E," and by reference made a part hereof.

## VII.

That thereafter the plaintiff in said action served and filed a motion for new trial, which came on regularly to be heard, and was by the court on the 30th day of September, 1919, denied, and thereafter the said F. O. McGill, by his counsel, did on the 10th day of November, 1919, serve on the attorneys for the defendant a notice of appeal to the Supreme Court of the State of Idaho, and filed the same with the Clerk of the said Court on the 12th day of November, 1919, and gave an undertaking as required by law, and the record in said cause was thereupon and thereafter filed in the office of the Clerk of the Supreme Court of the State of Idaho, and said plaintiff's said appeal argued and submitted to the said Supreme Court of the State of Idaho, and said Court on the 25th day of March, 1922, rendered its decision, copy of which is attached to the original complaint filed herein, marked Exhibit "F," and by reference made a part hereof; that within twenty days thereafter the de-



fendant William G. McAdoo duly served and filed his petition for rehearing in said cause, and said petition was on the 27th day of May, 1922, denied without opinion, and that thereupon the Judge of the District Court, pursuant to the instructions contained in said Supreme Court decision, made his findings of fact and conclusions of law in conformity therewith, a copy of which is attached to the original complaint filed herein, marked Exhibit "G," and by reference made a part hereof, and on the same date, to-wit, June 5th, 1922, signed and filed a decree of foreclosure, copy of which is attached to the original complaint filed herein, marked Exhibit "H," and by reference made a part hereof, and said decree was on the 5th day of June, 1922, recorded in the office of the County Recorder of Canyon County, Idaho, at Book 8 of Judgments, page 388 thereof, and thereupon became and ever since has been and now is a cloud upon the title and an apparent lien against the premises therein described.

### VIII.

That thereafter, to-wit, on the 8th day of June, 1922, the said F. O. McGill, defendant herein, who is a citizen of the State of Idaho, residing at Caldwell, in said state, procured an order of sale to be issued in said suit instituted by him, copy of which said order of sale is attached to the original com-



plaint filed herein, marked Exhibit "I," and by reference made a part hereof, and that the said F. O. McGill caused said order of sale to be delivered to the defendant H. W. Kinney, who then was, and ever since has been, and still is, the duly elected, qualified and acting Sheriff of Canyon County, Idaho, and a citizen and resident of said county and state, and the said H. W. Kinney has caused to be posted on said depot and at the County Court House of Canyon County, Idaho, and otherwise posted and published as required by the laws of the State of Idaho for Sheriff's sale on foreclosure of lien or mortgage, a notice that on the 12th day of July, 1922, he would, in obedience to said order of sale, sell at the front door of the County Court House in the City of Caldwell, in Canyon County, Idaho, a tract of land 150 feet by 150 feet, together with the building thereon known and described as the Oregon Short Line Railroad depot, located on the northeast boundary of Front Street in the City of Nampa at the intersection of Twelfth Avenue South, copy of which said notice of sale is attached to the original complaint filed herein, marked Exhibit "J," and by reference made a part hereof; that the fair and reasonable value of said passenger station, and the cost of reproducing the same in its present condition, with the usual and proper allowances for wear and tear and depreciation, is the

sum of Sixteen Thousand Two Hundred Forty-eight and no/100 Dollars (\$16,248.00), that said depot and premises described in said notice of sale are chiefly and peculiarly valuable for the purpose to which they are now devoted, and of more than \$3,000 lesser value for other purposes, and so connected and situated with reference to the plaintiff's railroad and system of transportation at Nampa, Idaho, that they are necessary where located to the proper discharge of the plaintiff's duty as a common carrier of passengers at said point, viz., at Nampa, Idaho, and are of such character and nature that if the same were sold at public auction, as by said notice contemplated, they would not sell for within more than \$3,000.00 of the value thereof to the plaintiff, or at all, and that if they shall be so sold the plaintiff will thereby sustain loss or damages in excess of the sum of Three Thousand Dollars, over and above the amount of said judgment and costs; and plaintiff is informed and believes, and therefore alleges the fact to be, that unless said defendants and each of them shall be restrained or enjoined by the order of this Court they will proceed to sell at public auction the said depot of the plaintiff and the premises upon which it is situated.

### IX.

That the premises upon which said depot is sit-

uated are not subject to execution and sale, but by virtue of the laws of the United States under which the same were granted to the predecessor in interest of the plaintiff from whom the plaintiff derains title, and under which the plaintiff now holds said premises, were granted by the United States, not as an absolute fee, but as a conditional grant and limited to use and occupation for railway purposes, unseverable from and inseparably attached to the franchise of the company owning or operating the same, and not subject to severance or sale under execution or otherwise; that prior to April 10, 1882, and for several years subsequent thereto, the Oregon Short Line Railway Company was a corporation organized under the general laws of the Territory of Wyoming, and prior to the filing and approval of the map or profile, as hereinafter alleged, had filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proof of its organizaion under the same; that prior to April 10, 1882, under and in accordance with and in pursuance of the provisions and requirements of an Act of Congress of the United States, approved March 3rd, 1875, said Oregon Short Line Railway Company filed with the Register of the local Land Office of the United States its map or profile of its main line of railroad, including its station grounds at Nampa,

which had previously been surveyed and located between Granger, Wyoming, and Huntington, Oregon, over and across the premises upon which the depot and tract of land described in the aforesaid notice of sale are situated; that said map or profile was filed with the Register of the said local land office within twelve months after the location of said main line of railroad and station grounds over and upon said premises, and that construction of said main line of railroad between Granger, Wyoming, and Huntington, Oregon, and over said described lands was completed between May, 1881, and November 20, 1884; that said profile or map of said road so located and constructed was on or about January 14, 1884, approved by the Secretary of the Interior of the United States, and noted on the plats of his office; that at the time of said survey, location and construction of said line of railroad, and filing and approval of said map or profile as aforesaid, said lands, including those described in the aforesaid notice of sale, were a part of the public lands or domain of the United States, and no homestead or other entry had been made thereon, or patent issued thereto and that upon the filing and approving of said map or profile as aforesaid said Oregon Short Line Railway Company, a corporation, acquired and was granted a right of way for said main line of railroad and station grounds



over and through said public lands, including those described in said notice of sale, and that the plaintiff herein, by a series of mesne conveyances, in 1897 acquired and succeeded to all right, title and interest in and to all railroad properties and right of way owned or held by said Oregon Short Line Railway Company, including its said right of way and station grounds at Nampa upon which said passenger depot is now situated, and that at all times since the filing and approval of said map or profile as aforesaid this plaintiff and its corporate predecessors in interest have been, and at all times mentioned in said complaint were, and this plaintiff now is, the legal owner and entitled to the sole and exclusive possession and use of said right of way and premises and every part thereof for the purpose of operating a railroad for the transportation of persons and passengers as a common carrier for hire, and for the maintenance of its said passenger station thereon, inseparable from its franchise and the remaining property of plaintiff employed in such purpose, and that by reason of the nature of said grant and the purposes thereof the plaintiff is entitled to the protection of this Court against the sale or pretended sale of or interference with the possession and use for railroad purposes of said depot, or any of the premises upon which the same is situated.



## X.

That on August 29, 1916, an Act of the Congress of the United States was approved by the President of the United States, providing:

“The President in time of war is empowered through the Secretary of War to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion as far as may be necessary of all other traffic thereon for the transfer or transportation of troops, war material and equipment, or for such other purpose connected with the emergency as may be needful or desirable.”

That thereafter by proclamations dated December 26th, 1917, and April 11th, 1918, the President of the United States, under and by virtue of the aforesaid authority vested in him by Congress, took possession and assumed control of the railroad of this plaintiff of which said station grounds at Nampa, with the buildings situated thereon described in said notice of sale, were a part and parcel, and necessary in the discharge of the public service and duty of said railroad at said point; that thereafter an Act of Congress was on March 21st, 1918, approved by the President of the United States, which said Act of Congress, among other things, provided for the continued possession, use, control and operation of certain lines of railroad, including the line of railroad of the plaintiff here-

in, which had theretofore been taken over by the President; that for the purpose of executing the powers granted to him with relation to federal control the President on December 26, 1917, appointed and placed in charge of said railroads an officer known as the Director General of Railroads, and said Director General of Railroads thereupon assumed the supervision and control of the said line of railroad of this plaintiff, and thereupon and thereby said premises were for all purposes taken wholly from and without the operation, management and control, or either thereof, of plaintiff, and replaced by the complete possession of Governmental authority; that by the establishment of said railroad administration, and subsequent order of the Director General of Railroads appointed by the President, the carrier companies, including the plaintiff herein, were completely separated from the control and management of their systems, and the managing officials and all persons employed on said line of railroad of plaintiff were by the United States Railroad Administration Bulletin No. 4, pages 113, 114 and 313 "required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration," and all such railway employees became and were under the exclusive employment and direction of the United States Rail-

road Administration, and were in no way controlled by ,or accountable to, their former employers, including plaintiff herein, and the plaintiff herein was thereby relieved from all liability on account of anything that might be said or done by any person connected with the operation, management or control of said system of railroad at any time during the year 1918, and none of said persons were the agents, servants or employees of this plaintiff; and that by reason of the nature and ownership thereof the foregoing property of this plaintiff cannot be taken from the plaintiff and sold, except in violation of those provisions of the Constitution of the United States guaranteeing to the plaintiff the equal protection of the laws and providing that no person shall be deprived of his property except by due process of law.

## XI.

That by Act of Congress approved by the President February 28, 1920, known as the "Transportation Act," which said Act of Congress was supplemental to and in furtherance of the purpose of said acts of Congress approved August 29th, 1916, and March 21st, 1918, it was provided:

"No execution or process other than on a judgment recovered by the United States against a carrier shall be levied upon the property of any carrier, where the cause of action

on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or any system of transportation by the President under federal control."

That the execution or order of sale by which the said defendants are proposing to and will, unless restrained and enjoined by the order of this Court, proceed to sell, grew out of the possession, use, control and operation of the line of railroad of the plaintiff by the President under Federal control, as hereinbefore alleged, and that such sale or attempted sale is in violation of the rights secured to this plaintiff by the provisions of said law.

## XII.

That on account of all of the foregoing facts the aforesaid judgment or decree of the said state court is without jurisdiction and void as against the plaintiff herein, and the plaintiff's said property and said defendants are without right or authority to levy upon or sell said premises under execution or otherwise, and said judgment constitutes a cloud as of an apparent lien, upon the title to said premises, and will continue so to do unless and until removed by the judgment or decree of a competent court having jurisdiction thereof, and that this court possesses such jurisdiction and authority.



XIII.

That plaintiff has no plain, adequate or speedy remedy at law.

WHEREFORE, plaintiff prays:

1. That a temporary or preliminary injunction be issued herein, restraining defendants, and each of them, from selling or offering for sale, that certain tract of land 150 feet by 150 feet, or the building thereon known and described as the Oregon Short Line passenger depot, located upon the northeast boundary of Front Street at the intersection of Twelfth Avenue South, in the City of Nampa, Canyon County, Idaho, or any part of said land or building, and from executing, enforcing, or satisfying, or attempting to execute, enforce or satisfy said order of sale of said premises issued by the District Court of Canyon County, Idaho, on June 8, 1922, or said notice of sale of said premises on July 12, 1922, posted and published by defendant H. W. Kinney, as Sheriff of Canyon County, Idaho, or any other order or notice of sale under said judgment, and ordering and enjoining said defendants, and each of them, to vacate, cancel and quash said notice of sale so issued, posted and outstanding:

2. That upon final hearing of this action, said preliminary or temporary injunction be made permanent and final; and that said lien, or so-called



lien, and the judgment based thereon, be adjudged and held to be null and void and of no effect and to constitute an unlawful cloud on the title of the premises of the plaintiff herein, and that such cloud be removed therefrom, and that both of the defendants, their agents, successors and assigns and all persons claiming under, by or through them, or any of them, be perpetually restrained and enjoined from asserting or attempting to assert such or any lien or to sell or otherwise dispose of all or any portion of said premises by authority thereof;

3. That plaintiff be granted such other and further relief herein as may be right, proper, and equitable;

4. That plaintiff have and recover its just costs and disbursements herein incurred.

OREGON SHORT LINE RAILROAD COMPANY,  
A Corporation, Plaintiff.

By GEORGE H. SMITH,  
H. B. THOMPSON,  
JOHN O. MORAN,  
Its Attorneys.

Duly Verified.

Endorsed, Filed Sept. 15, 1922.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

EXHIBIT "A"

MECHANIC'S LIEN

NOTICE IS HEREBY GIVEN That F. O. McGill, doing business under the firm name and style of McGill Construction Company, at the time hereinafter named, made a contract with the Oregon Short Line Railroad Company, by which he agreed to furnish materials and labor necessary in the repair of a certain building or structure now upon that certain lot or parcel of land situated in the city of Nampa, County of Canyon, State of Idaho, and sought to be charged with this lien and described as follows, to-wit:

A piece of land with the building thereon known as the Oregon Short Line Passenger Depot, 150 feet by 150 feet, located upon the Northeast border of Front Street, at the intersection of 12th Avenue.

That said Oregon Short Line Railroad Company, a corporation is the name of the owner and reputed owner of the said premises and caused the said building to be repaired and the nature of the title to the said premises is a fee simple;

That F. O. McGill, doing business as the McGill Construction Company, is the name of the contractor who, on or about the 14th day of November, 1918, as such contractor, entered into a contract with the said Oregon Short Line Railroad Com-

pany, under and by which the said F. O. McGill was to repair the said building and the following is a statement of the terms, time given and conditions of said contract, to-wit:

That said contractor was required by the Oregon Short Line Railroad Company to submit a bid or proposal for such work to be done immediately, or within a reasonable time. And the said contractor submitted his bid and offered to do said work for the sum of Five Hundred Twenty Dollars (\$520.00) and that the Oregon Short Line Railroad Company accepted such bid and instructed the said contractor to proceed at once and repair the said building.

That all the necessary materials were furnished to be used and were actually used in the repair of said building. That said contractor furnished the said material and labor and finished the said work on the 21st day of November, 1918, and on said date notified the Oregon Short Line Railroad Company that the building was finished and the Agent of the Oregon Short Line Railroad Company, to-wit, L. Castagneto, Foreman of Construction, issued his certificate that the said work was done according to the contract.

That the said contract has been fully performed on the part of F. O. McGill and the same was com-

pleted and the building repaired in accordance with said contract, on the 21st day of November, 1918.

That the amount of the contract price for said work and materials performed and furnished on said building, is the sum of Five Hundred Twenty Dollars (\$520.00).

That no part of the said contract price has been paid and the said sum of Five Hundred Twenty Dollars (\$520.00) is still due and owing to the said F. O. McGill, after deducting all just credits and off-sets.

WHEREFORE, said F. O. McGill, otherwise known as McGill Construction Company, claims the benefit of the law relative to liens of mechanic's and others upon real property, to-wit, Title 4, chapter 1, of the Code of Civil Procedure of the State of Idaho.

F. O. McGILL.

State of Idaho,            )  
County of Canyon,    ) ss.

F. O. McGill, being first duly sworn, deposes and says that he is the claimant named in the foregoing claim of lien; that he has read the said claim of lien and knows the contents thereof; that the materials and labor has been furnished and performed and that the said charge is reasonable and just.

F. O. McGILL,

Subscribed and sworn to before me this 14th day  
of December, 1918.

GEORGE W. LAMSON,  
Notary Public for Idaho, Residing at Nampa, Ida.  
(SEAL)

Endorsement

Recorded at 9:42 A. M., December 16th, 1918.

### EXHIBIT "B"

IN THE DISTRICT COURT OF THE SEVENTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY  
OF CANYON.

F. O. McGill, doing business )	
under the firm name and )	
style of McGill Construction )	
Company,	Plaintiff, )
	AMENDED
vs.	) COMPLAINT
William G. McAdoo, Director )	
General of Railroads,	)
Defendant.	)

The plaintiff complains and alleges:

#### I.

That the defendant is now and was at the times  
hereinafter named, Director General of Railroads  
and has under his control in behalf of the United



States the Oregon Short Line Railroad, a corporation organized and existing under the laws of the State of Utah and maintaining and operating a line of railroad between the state of Utah and Idaho and elsewhere.

## II.

That since the 13th day of April, 1918, the Oregon Short Line Railroad has been and now is a transportation system included in the President's Proclamation under Federal Control of the United States Government subject, however, to the provisions of said proclamation which provides that suit may be brought by and against the said carrier and judgments rendered as before the said proclamation was made, except so far as the Director General of Railroads, under Federal Control by general or special orders, otherwise may determine.

## III.

That the Director General of Railroads of the United States has made a general order known as General Order Number 50, prohibiting the institution of suits or the rendering of judgments against transportation systems administered by the United States under the President's Proclamation.

## IV.

That the plaintiff herein has applied to the Di-

rector General of Railroads under federal control for permission to levy by mesne process and foreclose his lien against the property hereinafter described and affected by the lien of the plaintiff herein sought to be foreclosed.

## V.

That on or about the 14th day of November, 1918, at Nampa, Idaho, the plaintiff and the agents and operating officials, of the Oregon Short Line Railroad at Nampa, Idaho, entered into a verbal agreement whereby the plaintiff submitted a written offer to furnish material and repair that certain building or structure for the Oregon Short Line Railroad Company, at Nampa, Idaho, hereinafter described and that the defendant, through said agents and operating officials, accepted the said proposition and agreed to pay the plaintiff for the said repairs the sum of Five Hundred Twenty and no/100 Dollars, (\$520.00) upon the completion thereof and the plaintiff avers that he completed the said building under said contract on or about the 21st day of November, 1918, and that he has fully kept and performed the said agreement in all things to be kept and performed by him, but the said defendant has not paid the said sum of Five Hundred Twenty-Dollars (\$520.00) mentioned in said agreement or any part thereof.

## VI.

That the lands upon which said building stands and upon which said repairs were made are described as follows, to-wit: A piece of land 150 feet by 150 feet located upon the northeast boundary of Front Street at the intersection of 12th Avenue, in the city of Nampa, County of Canyon, State of Idaho.

## VII.

That at the date of said contract the Oregon Short Line Railroad Company was the owner and reputed owner of the lands hereinbefore described and ever since has been and now is the owner and reputed owner of said lands and the said building so repaired thereon, and the defendant was then in charge of said transportation system and caused said building to be repaired.

## VIII.

That the plaintiff began to furnish material and perform labor thereon under said agreement on or about the 15th day of November, 1918, and that all of the said materials were furnished and the said building repaired between that date and the 22nd day of November, 1918, on which last named day said building was completely repaired in accordance with said contract.

## IX.

That on the 21st day of November, 1918, the construction foreman of the Oregon Short Line Railroad Company, acting for the United States Government, inspected said work and made his certificate to the effect that the same was finished and completed, which certificate is in words and figures following, to-wit:

Nampa, Idaho, Nov. 21st, 1918.

The repair work done by the McGill Construction Co., on the O. S. L. Depot in Nampa is complete and finished. O. K. L. Castagneto, B. & B. Foreman.

## X.

That on or about the 15th day of December, 1918, the plaintiff, for the purpose of securing and perfecting a lien for the moneys so due him as aforesaid under said contract upon the building and land hereinbefore described under the provisions of Title 4, Chapter 1, Revised Codes of Idaho, filed for record in the office of the Clerk of the District Court and Ex-officio Auditor and Recorder of Canyon County, Idaho, his claim thereof duly verified by him, a copy of which is hereto attached, marked Exhibit "A" and made a part of this Complaint, and which said claim of lien was thereafter on the same day duly recorded in said office in a book kept



therein for that purpose, to-wit: Book 3, of Liens, at page 120.

### XI.

That plaintiff paid for verifying and recording said lien Two and 50/100 Dollars.

### XIII.

That plaintiff has incurred an obligation to pay his attorney in the prosecution of this action the sum of One Hundred Dollars, as attorney's fees, which sum is alleged to be reasonable.

WHEREFORE, the plaintiff prays judgment for the sum of Five Hundred Twenty Dollars, remaining unpaid for said labor and materials and for costs of suit; for Two and 50/100 Dollars paid for verifying and recording said lien, and the further sum of One Hundred Dollars as attorney's fees and that the aggregate sum, together with the costs be adjudged a lien upon the land and premises hereinbefore described; that said land and premises may be sold under the order and decree of this court and the proceeds thereof be applied to the payment of the costs of this suit and the sum so found due to the plaintiff, and that he have execution for any deficiency and for such other relief as to the Court seems proper.

G. W. LAMSON,  
Attorney for Plaintiff, Residing at Nampa, Idaho.  
Verified: By F. O. McGill, December 31st, 1918.



## EXHIBIT "C"

IN THE DISTRICT COURT OF THE SEVENTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY  
OF CANYON.

F. O. McGill, doing business )	
under the firm name and )	
style of McGill Construction )	
Company, )	
	Plaintiff, )
	ANSWER.
vs. )	
William G. McAdoo, Director )	
General of Railroads, )	
	Defendant. )

## II.

Admits the allegations contained in Paragraph II  
of said amended complaint.

## III.

Admits that the Director General of Railroads of  
the United States has made a general order known  
as General Order No. 50, but denies that said order  
prohibits the institution of suits or the rendering  
of judgments against railroad corporations arising  
out of matters of the nature described in said com-  
plaint, and denies that said General Order No. 50,  
prohibits the institution against the Oregon Short

Line Railroad Company of a suit of the character described in the plaintiff's said amended complaint.

#### IV.

Answering Paragraph IV of said amended complaint, defendant denies that the plaintiff has applied to the Director General of Railroads for permission to levy by mesne process and foreclose, or either thereof, his, or any, lien, against the property described in said complaint.

#### V.

Denies that on or about the 14th day of November, 1918, at Nampa, Idaho, or elsewhere, the plaintiff and operating officials of the Oregon Short Line Railroad at Nampa, Idaho, entered into a verbal, or other agreement, whereby the plaintiff submitted a written, or other, offer to furnish material and repair any building or structure for the Oregon Short Line Railroad Company, and denies that the defendant, through any agents or operating officials, accepted said or any proposition, or agreed to pay to plaintiff the sum of Five Hundred Twenty (\$520.00) Dollars, or any other amount, or that any agents or operating officials, if any, to whom the plaintiff may have submitted any offer, had jurisdiction or authority to contract therefore; admits that the plaintiff made certain repairs on the passenger depot of the Oregon Short

Line Railroad Company at Nampa, Idaho, and that said repairs were completed in November, 1918, but denies that thereby, or otherwise, the plaintiff has fully or otherwise, kept or performed any agreement made by and between himself and any agent duly authorized or otherwise, of the defendant herein, or of the Oregon Short Line Railroad Company; admits that the defendant has not paid the sum of \$520.00, or any other amount; but on the contrary alleges that whatever services were performed on or about said building were done by the plaintiff by agreement with any at the sole special instance and request of one Frank Noble who contracted and agreed to pay the plaintiff therefor.

## VI.

Admits the allegations contained in Paragraph VI of said amended complaint.

## VII.

Admits the allegations contained in Paragraph VII of said amended complaint, but denies that the defendant caused said building to be repaired.

## VIII.

Admits the allegations contained in Paragraph VIII of said amended complaint, except that defendant denies that said building was repaired in accordance with any contract alleged or described in said amended complaint.

## IX.

Defendant has not knowledge or information sufficient to form a belief as to whether on the 21st day of November, 1918, or any other time, any person acting for the United States Government inspected said work or made his certificate to the completion thereof, either as alleged in paragraph 9 of said amended complaint, or otherwise, or at all, and upon that ground denies the same, and denies that any construction foreman of the Oregon Short Line Railroad Company, acting for the United States Government, inspected said work or made a certificate as alleged in paragraph 9 of said amended complaint.

## X.

Answering paragraph 12 of said amended complaint, defendant denies that plaintiff has incurred an obligation to pay his attorney in the prosecution of this action the sum of \$100.00, or any other amount, or that said sum, or any other amount, is reasonable for the prosecution of said action.

WHEREFORE, defendant having fully answered herein, prays to be hence dismissed with its just costs and disbursements herein incurred.

GEO. H. SMITH,

H. B. THOMPSON,

Attorneys for Defendant.

Residence and Post Office Address of H. B. Thompson,  
Pocatello, Idaho.

(Verified by H. B. Thompson, January 20th, 1919)

# EXHIBIT "D"

IN THE DISTRICT COURT OF THE SEVENTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY  
OF CANYON.

F. O. McGill, doing business )	
under the firm name and )	
style of McGill Construction )	FINDINGS OF
Company, )	FACT AND
Plaintiff, )	CONCLU-
vs. )	SIONS OF
William G. McAdoo, Director )	LAW
General of Railroads, )	
Defendant. )	

This cause coming on regularly for trial before the Court on the 7th day of June, 1919, the action not being one involving or requiring a jury, but seeking the foreclosure of a mechanic's lien and thereby invoking the equitable powers and jurisdiction of this Court, Geo. W. Lamson, Esq., appearing as counsel for the plaintiff and John O. Moran, Esq., appearing for the defendant, and after hear-



ing the allegations and proofs of the parties, the argument of counsel, and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law, constituting my decision in said action:

## FINDINGS OF FACT.

### I.

That by an Act of Congress approved August 29, 1916, Chapter 418, 39 Stat. 645, it was provided:

“The President in time of war is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation or any part thereof, and to utilize the same to the exclusion as far as may be necessary, of all other traffic thereon, and for the transfer or transportation of troops, war material, and equipment or for such other purposes connected with the emergency as may be needful or desirable.”

On April 6, 1917, the Congress of the United States, by joint resolution of the Senate and House of Representatives resolved that a state of war existed between the United States and the German Government, by the authority thus vested in the President of the United States by the Act of Congress above referred to, and said joint resolution,

the President of the United States, on Dec. 26, 1917, issued a proclamation relative to government control of the railroads, together with an explanatory statement relating thereto. Under and by virtue of said Proclamation on the exclusive operation use, possession and control of Oregon Short Line Railroad was taken over and assumed by the President through the said Secretary of War, and the same has ever since been operated by and under the exclusive jurisdiction and control of the Director General of Railroads of the United States, formerly William G. McAdoo, the defendant herein. On Oct. 28th, 1918, the said Director General of Railroads issued his General Order No. 50, whereby the United States Railroad Administration consented to be used in certain instances, and providing in particular as follows:

“It is therefore ORDERED that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract binding upon the Director General of Railroads, claim for death, or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession use, control or operation of any railroad or system of transportation by the Director General of Railroads which action, suit or proceedings, but for Federal control, might have been brought against the carrier com-

pany, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures."

## II.

That between about November 14, 1918, and November 21, 1918, plaintiff repaired the depot of the Oregon Short Line Railroad at Nampa, Idaho, which was then under the control and in the possession of defendant as Director General of Railroads of the United States, as aforesaid,—plaintiff furnishing the necessary materials and performing the necessary labor therefor.

## III.

The repair of such depot by plaintiff and the furnishing of material and labor therefor were not done at the instance or request of defendant or any of his officers or agents, or by virtue of or in pursuance to any agreement by defendant to pay plaintiff for the repair of such depot. No bid or proposal for the repair of such depot by plaintiff was ever at any time accepted or acted upon by defendant or any of his officers, agents or employees.

## IV.

Defendant, through his officers and agents merely gave permission and consent to plaintiff to re-

pair such depot at Nampa, Idaho, defendant believing and understanding at the time that plaintiff had been employed by one Frank Noble to repair such depot in consideration of the sum of \$520.00 and that plaintiff expected and intended to repair such depot under and in pursuance of such contract with said Frank Noble.

## CONCLUSIONS OF LAW.

### I.

There was no meeting of minds between the plaintiff and defendant, as to the repair of the depot at Nampa, or the furnishing of labor and materials therefor by plaintiff on behalf of the defendant, and defendant is not indebted to plaintiff in any sum whatsoever on account of repair of such depot or the furnishings of labor or materials therefor.

Plaintiff therefore is not entitled to recover in this action.

Dated at Caldwell, Idaho, August 14th, 1919.

ED C. BRYAN,

District Judge

EXHIBIT "E"

IN THE DISTRICT COURT OF THE SEVENTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY  
OF CANYON.

F. O. McGill, doing business )	
under the firm name and )	
style of McGill Construction )	
Company, )	
	Plaintiff, ) JUDGMENT
vs. )	
William G. McAdoo, Director )	
General of Railroads, )	
Defendant. )	

This cause came regularly on for trial on the 7th day of June, 1919, Geo. W. Lamson, Esq., appearing as counsel for the plaintiff, and John O. Moran, Esq., appearing as counsel for the defendant. The action being one to foreclose a mechanic's lien and invoking the equitable powers and jurisdictions of this Court, said cause was tried before the Court sitting without a jury. Whereupon F. O. McGill, Frank Noble, and others were examined as witnesses on the part of the plaintiff, and F. H. Knickerbocker, W. T. Ennis and F. M. Woodruff were examined as witnesses on behalf of the de-



fendant and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon, the Court entered its findings and decision in writing, which are filed, and orders that judgment be entered in accordance therewith.

WHEREFORE, by reason of the law and the findings aforesaid, it is Ordered, Adjudged and Decreed that the plaintiff take nothing by his said complaint, and that the defendant William G. McAdoo, Director General of Railroads of the United States, have and recover of and from the plaintiff, F. O. McGill, doing business under the firm name and style of McGill Construction Co., judgment for his just costs and disbursements herein, incurred, amounting to the sum of \$77.75, and that said sum of \$77.75, with interest thereon at 7% per annum from the date of this judgment be paid to said defendant in gold coin of the United States, and that defendant have execution therefore.

Judgment rendered this 14th day of August, 1919.

ED. L. BRYAN,  
District Judge.

EXHIBIT "F"

IN THE SUPREME COURT OF THE STATE  
OF IDAHO

F. O. McGill, doing business )  
under the firm name and )  
style of McGill Construction )  
Company, )

Plaintiff and Appellant, )

vs. )

William G. McAdoo, Director )  
General of Railroads, )  
Defendant and Respondent. )

Boise January Term 1922 Filed March 25th, 1922,  
I. W. Hart, Clerk.

MECHANIC'S LIEN—AGAINST PROPERTY  
OF RAILROAD COMPANY—FEDERAL CON-  
TROL ACT—PRESERVES RIGHTS AND REM-  
EDIES AGAINST CARRIERS — DIRECTOR  
GENERAL—PROPER PARTY DEFENDANT.

1. Where the authorized agents of a railroad company instruct a mechanic to repair damages done to a depot building belonging to the company, done by a third person, such building will be liable to a mechanic's lien for the value of the labor done and material furnished, unless such agents notify such mechanic in advance of his do-

ing the work that he must look to the third party for his compensation.

2. The purpose of the Federal Control Act of March 21, 1918, ch. 25, (40 Stat. L. 451,) was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as this might interfere with the needs of federal operation, and applies to causes against carriers either at law or in equity, and General Order. No. 50 requires that such actions be against the Director General by name.

Appeal from the District Court of the Seventh Judicial District, in and for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to foreclose a mechanic's lien. Judgment for defendant, and plaintiff appeals. *Reversed and remanded.*

George W. Lamson, attorney for appellant.

George H. Smith, H. B. Thompson and John O. Moran, attorneys for respondent.

LEE, J.

This is an action by appellant F. O. McGill, doing business as the McGill Construction Company, to foreclose a mechanic's lien upon the station building and premises at Nampa belonging to the Ore-

gon Short Line Railroad System, for repairs made while the name was under the control of William G. McAdoo, Director General of Railroads.

The case was tried without the intervention of a jury, and at the close of appellant's case respondent moved for nonsuit, which was denied. At the close of the trial the court made and entered its separate findings and conclusions and decree thereon, to the effect that appellant take nothing by reason of his complaint and that respondent recover costs. Thereafter a motion was made for a new trial and denied, from which order this appeal is taken.

The record presents two questions for determination: (1) The right of appellant to enforce a mechanic's lien against the property of the Oregon Short Line Railroad Company for the repairs made upon its passenger depot at Nampa, Idaho: (2) the right of appellant to maintain this action against William G. McAdoo, Director General of Railroads.

That facts, in so far as they are material are as follows:

About August 21, 1918, an automobile belonging to one Frank Noble was carelessly driven over the street curbing into the window of said passenger depot at Nampa, breaking in the window and the adjacent brick wall on the southerly side of the



building, fronting the main thoroughfare approaching said building. After conference with the local trainmaster and other employees of the railroad company, then in the service of the Director General, appellant submitted a bid in writing to furnish the material and labor to repair this building. The proposal was referred by W. T. Ennis, the trainmaster, to his superior, J. B. Stevenson, superintendent of the Idaho Division, at Pocatello. Some days later the appellant was informed that his proposal was accepted, the work to be done under the direct supervision of the bridge and building department foreman. The work was accordingly completed and approved by said foreman, and a statement was rendered for the same in November following, which was forwarded to the division superintendent, who returned the same to appellant December 5, 1918, making no objection to the quality of the work performed or the material furnished, or to the price charged therefore, but stating that as the bill was incurred at the direction and request of Mr. Noble and not at the request of the Oregon Short Line Company, appellant should look to Mr. Noble for his pay. Thereafter on the 16th day of December appellant prepared and filed a mechanic's lien against the said depot building, claiming for such material furnished and labor performed the sum of \$520.00. Suit was



thereafter commenced to foreclose such lien, the Oregon Short Line Railroad Company first being made defendant, but the complaint was subsequently amended making William G. McAdoo, Director General of Railroads, Defendant.

The complaint, in addition to the usual allegations for the foreclosure of a mechanic's lien *inter alie* alleges that the defendant, as the Director General of Railroads, has under his control on behalf of the United States the Oregon Short Line Railroad System; that said company is a corporation organized and existing under the laws of the state of Utah, and maintains and operates a line of railroads between Utah and Idaho, and elsewhere; and that at the time of the commencement of this action it had been included in the President's proclamation placing the same under federal control.

The answer admits the corporate existence of the Railroad Company and the taking over of its system by the Director General, but denies that General Order No. 50 prohibits the institution of suits or the rendering of judgments against railroad corporations arising out of matters of the nature described in the complaint, or that the appellant and the operating officials of said system entered into an agreement whereby appellant was to furnish material and perform labor for the repair of said building. It admits that appellant made the re-

pairs in question, and that he has not been paid for the same, and alleges that whatever services were performed by appellant were on account of an agreement between himself and the said Frank Noble, who contracted and agreed to pay the appellant therefore.

C. S. Sec. 7339 provides that:

“Every person performing labor upon, or furnishing material to be used in the construction, alteration or repair of any\*\*\*\* building\*\*\*\*\* railroad\*\*\*\*\* has a lien upon the same for the work or labor done on material furnished, whether done or furnished at the instance of the owner of the building\*\*\*\* or his agent; and every contractor, subcontractor, architect, builder or any person having charge of \*\*\* the constructions, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter.”

It was to intent of the mechanic's lien law to grant an absolute lien upon the property, to persons who perform labor or furnish material to be used in building or improving such structure: and every contractor, subcontractor, architect, builder or other person having charge of such building or of its alteration or repair shall be held to be the agent of the owner for the purposes of this lien law. *Hill v. Twin Falls, Etc., Water Co.*, 22 Idaho. 274, 125 Pac. 204.

The purpose of the statute is to compensate a man who performs labor upon or furnishes material to be used in the construction, alteration or repair of a building or structure, *Chamberlain v. City of Lewiston*, 23 Ida. 154, 129 Pac. 1069.

It is not sufficient to relieve the property of this company from the operation of the mechanic's lien law for the employees or managing agents of the railroad company to say that they understood that appellant should look to the party who had done the damage to the depot building for his compensation for making such repairs. When they authorized him to proceed with this work without an agreement on his part that he would look for his compensation solely to the person who has caused the injury, they thereby subjected the building to a lien for the reasonable value of such labor and material so furnished. There being no question about its value, appellant's right to recover cannot be denied, unless bringing his action against the Director General precludes his right of recovery.

The President took control of this railroad on December 26, 1917, pursuant to the proclamation of December 26, 1917, (40 Stat. L. 1733) under the act of August 29, 1916, ch. 418, (39 Stat. L. 619, 645, Comp. Stat. sec. 1974a. He was operating it through the Director General under the Federal Control Act (March 21, 1918, ch. 25, 40 Stat.

L. 451, Comp. Stat. 3115 3-4a, fed. Stat. Ann. Supp. 1918 p. 757) when appellant was employed to furnish this material and make this repair. The railroad administration established by the President in December, 1917, did not exercise its control through the supervision of the owner companies, but by means of the Director General, through "one control, one administration, one power for the accomplishment of the one purpose, the complete possession by government authority, to replace, for the period provided, the private ownership theretofore existing." *Northern Pac. R. Co. v. North Dakota*, 250 U. S. 135, 63 L. ED. 897, P. U. R. 1919D p. 705.

This authority was confirmed by the Federal Control Act of March 21, 1918, ch. 25, (40 Stat. L. 451) and the ensuing proclamation of March 29, 1918, (40 Stat. L. 1763). By the establishment of the Railroad Administration and the subsequent orders of the Director General, the carrier companies were completely severed from the control and management of their systems. Managing officials were were "required to sever their relations with the particular companies and to become exclusive members of the United States Railroad Administration." U. S. R. R. Adm. Bulletin No. 4, pp. 113-114-313. The railway employees were under this direction, and were in no way controlled by their former employers.



Sec. 10 of the Federal Control Act provides:

“That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers, and judgment entered as now provided by law; and in any action at law or suit in equity may be brought by and against such carriers, and judgment entered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality of the Federal government, \*\*\* But no process, mesne or final, shall be levied against any property under such Federal control.”

“The plain purpose of the above provisions was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights and remedies might interfere with the needs of Federal operation \*\*\* and applies to cases against the carrier companies\*\*\*where both cause of action and suit had arisen\*\*\* during Federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system.”

“All doubt as to how suit should be brought was cleared away by General Order No. 50,



which required that it be against the Director General by name." *Missouri Pac. R. Co. and Hines, Director General, Etc., v. Ault*, 256, U. S.—, 41 Sup. Ct. 593, 65 L.Ed. 647.

The cause is reversed and remanded, with instructions to proceed in accordance with the views herein expressed. Costs awarded to appellant.

RICE, C. J. and BUDGE, J., Concur.

### EXHIBIT "G"

#### IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON.

F. O. McGill, doing business)	
under the firm name and)	
style of the McGill Construc-	) FINDINGS
tion Company,	) OF FACT
	) AND
Plaintiff,	) CONCLUSION
vs.	) OF LAW.
William G. McAdoo, Director )	
General of Railroads,	)
Defendant. )	

This cause having been tried by the Court without a jury on the 7th day of June, 1919, and a decree having been entered for defendant, and the cause having been appealed to the Supreme Court and the Supreme Court having reversed the said decree and having ordered judgment to be entered in

favor of the plaintiff, the Court now amends the Findings of Fact in accordance with the directions of the Supreme Court as follows:

## FINDINGS OF FACT.

### I.

Findings No. 1 filed in the original action is adopted.

### II.

Findings No. 2 of the original action is adopted.

### III.

Findings No. 3 and No. 4 are set aside and in lieu thereof the Court finds the following facts:

That repair of the Oregon Short Line Depot by plaintiff was done at the instance and request of defendant through its officers and agents who had charge of the property on which the labor and material was supplied and furnished and said officers were the agents of the Oregon Short Line Railroad Company who acted in pursuance of an applied agreement between the defendant and plaintiff for such repairs; that a bid was submitted to the officers of the Oregon Short Line Railroad Company having charge of the passenger depot by which the plaintiff offered to do the work for \$520.00 and that such bid was accepted and acted upon by the defendant.

## CONCLUSIONS OF LAW.

## I.

That conclusion No. 1 made in pursuance of original trial of this action is set aside and the following conclusions in accordance with the ruling of the Supreme Court is adopted to-wit: That the plaintiff is entitled to a judgment for \$520.00 principal sum, and \$100.00 Attorney's fees, together with interest on the aggregate sum from the 21st day of November, 1918, and that the same is a lien upon the property described in the complaint and Claim of Lien.

Let judgment be entered and order of sale be made accordingly-

ED. L. BRYAN,

Judge of the District Court.

## EXHIBIT "H"

IN THE DISTRICT COURT OF THE SEVENTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY  
OF CANYON.

F. O. McGill, doing business as)  
the McGill Construction Com-)  
pany,

Plaintiff, ) DECREE OF

vs.

) FORECLOS-

William G. McAdoo, Director )  
General of Railroads, )

URE.

Defendant. )

This action having been tried and a judgment rendered for the defendant and the plaintiff having appealed from the decision and judgment and the said judgment having been reversed by the Supreme Court and the Supreme Court having found and ordered that a judgment be entered for the plaintiff, F. O. McGill for Five Hundred Twenty Dollars (\$520.00), with interest and costs and that amount thereof together with the costs and attorney's fees, is a lien against the real property described in the complaint.

Now on motion of G. W. Lamson, attorney for plaintiff, it is ordered, adjudged and decreed that there is now due and owing to the plaintiff from the defendant, the Oregon Short Line Railroad Company, for the costs of material and labor in the improvement and repair of the building and structure described in the complaint, the sum of Five Hundred Twenty Dollars (\$520.00) principal and the sum of One Hundred Twenty-eight Dollars and 40/100 Dollars (\$128.40), interest, and the sum of One Hundred Dollars (\$100.00) attorney's fees, together with Thirty-one and 5/100 Dollars (\$31.05) costs and disbursements in the trial of said action and costs taxes by the Supreme Court Fifty-two Dollars (\$52.00), and costs of filing and verifying Claim of Lien, Two and 50/100 Dollars (\$2.50), and the said defendant, the Oregon Short Line Railroad Company, is liable for the whole amount



thereof and that the said aggregate amount is a valid lien upon the lands and premises in the plaintiff's complaint and hereinafter described.

That the whole of said premises hereinafter described is required for the convenient use and occupation of the said building and that said premises and the interest of the defendant, the Oregon Short Line Railroad Company, therein, at the time of the commencement of the work and the furnishing of material aforesaid, to-wit, the 21st day of November, 1918, or which it has since acquired therein are subject to a lien for all of said sum under the provisions of Chapter 267 of the Code of Civil Procedure of the State of Idaho and the acts amendatory thereof.

That the said interest of the said Oregon Short Line Railroad Company in and to the said building and premises above described be sold to satisfy the amount of the said several sums above specified, including the costs of this action and the cost of filing the claim of lien.

That such sale be made by the Sheriff of the County of Canyon; that the said Sheriff give notice thereof in the manner provided by law; that said premises be sold in one parcel; that out of the proceeds of such sale the Sheriff pay to G. W. Lamson, plaintiff's attorney, the sum of Eight Hundred Thirty-three and 95/100 Dollars (\$833.95) total



amount of the principal sum, interest, attorney's fees and costs and such further sum as shall accrue as costs in the sale of said premises.

That if any deficiency arise upon such sale in the payment of the said sums so adjudged to be due the said sheriff specify the same in his report of sale and that judgment may be rendered therefore against the defendant and that the purchaser or purchasers at such sale be entitled to a writ of assistance to obtain possession of the premises sold in manner provided by law.

The premises upon which said lien is sought to be foreclosed is situate, lying and being in the City of Nampa, County of Canyon, State of Idaho, described as follows, to-wit:

A piece of land with the building thereon known as the Oregon Short Line Passenger Depot, 150 feet by 150 feet, located upon the northeast border of Front Street, at the intersection of 12th Avenue.

Judgment entered this 5th day of June, 1922.

ED. L. BRYAN,

*Judge of the District Court.*

Recorded in Judgment, Book 8, Page 388.

## EXHIBIT "I"

IN THE DISTRICT COURT OF THE SEVENTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY  
OF CANYON.

F. O. McGill, doing business as)		
the McGill Construction Com-)		
pany,	)	
	Plaintiff, )	ORDER OF
vs.	)	SALE.
William G. McAdoo, Director )		
General of Railroads,	)	
Defendant. )		

## THE STATE OF IDAHO

TO THE SHERIFF OF CANYON COUNTY,  
GREETING:

WHEREAS, on the 5th day of June, 1922, the plaintiff, F. O. McGill, recovered a judgment that there was then due to the plaintiff from the Oregon Short Line Railroad Company on a contract and claim for mechanics' lien mentioned and described in the complaint, the sum of Eight Hundred Thirty-three and 95/100 Dollars, which includes all costs and disbursements at the date of said judgment, and whereas, it was further established and adjudged that the plaintiff possessed a mechanic's lien for the amount so adjudged to be due the plaintiff, which sum included all costs

and disbursements as aforesaid upon the following described premises, situate, lying and being in the County of Canyon, State of Idaho, to-wit: A tract of land 150 feet by 150 feet, together with the building thereon known and described as the Oregon Short Line Passenger Depot located upon the northeast boundary of Front Street in the City of Nampa at the intersection of 12th Avenue South, and that said premises be sold to satisfy said lien and costs.

THEREFORE, we command you, that you execute said judgment by making sale of said premises herein above described or so much thereof as may be necessary to satisfy said sums so adjudged to be due to the plaintiff, with interest thereon from the date of said judgment, together with costs and expenses of sale in accordance with the requirements of said judgment and apply the funds realized on said sale in conformity therewith; and make the return of this writ to the Clerk of said Court within sixty days from date hereof.

WITNESS the Honorable Ed L. Bryan, Judge of the District Court of the Seventh Judicial District in and for Canyon County and the seal of said Court this 8th day of June, 1922.

ROSE EDWARDS,

*Clerk of the District Court.*

By B. L. Newell, Deputy.

(SEAL)

## EXHIBIT "J"

## NOTICE OF SHERIFF'S SALE.

F. O. McGill, doing business as)	
the McGill Construction Com-)	NOTICE OF
pany,	SHERIFF'S
	SALE ON
Plaintiff, )	FORECLOS-
vs.	URE OF
William G. McAdoo, Director)	MORTGAGE.
General of Railroads,	
Defendant. )	

UNDER AND BY VIRTUE of an order of sale and decree of foreclosure, issued out of the District Court of the Seventh Judicial District, State of Idaho, in and for the County of Canyon on the 8th day of June, 1922, in the above entitled action, wherein F. O. McGill, doing business as the McGill Construction Company, the above named plaintiff obtained a decree against William G. McAdoo, Director General of Railroads, defendant on the 5th day of June, 1922, which said decree was, on the .....

..... day of....., recorded in Judgment Book..... of said Court, at page..... I am commanded to sell all that certain lot, piece or parcel of land situated in the County of Canyon, State of Idaho, and bounded and described as follows, to-wit:

A tract of land 150 feet by 150 feet, together with the building thereon known and described as the Oregon Short Line Passenger Depot, located upon the northeast boundary of Front Street in the City of Nampa, at the intersection of 12th Avenue, South.

NOTICE IS HEREBY GIVEN, That on the 12th day of July, 1922, at 2 o'clock P. M. (Mountain Time), of that day in front of the Court House door in the City of Caldwell, County of Canyon, I will, in obedience to said order of sale and decree of foreclosure, sell the above described property, or so much thereof as may be necessary to satisfy the plaintiff's decree with interest thereon and costs to the highest bidder for cash, lawful money of the United States.

H. W. KINNEY,

*Sheriff.*

By A. B. Cornell, *Deputy.*

Dated June 8th, A. D. 1922.

---

(Title of Court and Cause.)

No. 998.

In Equity.

MOTION FOR TEMPORARY OR PRELIMINARY INJUNCTION.

COMES NOW the above named plaintiff, and upon the verified bill of complaint herein and the



affidavits to be filed on or before the date hereinafter specified for a hearing, moves the Court for a temporary or preliminary injunction, restraining the above named defendants, F. O. McGill and H. W. Kinney, and each of them, from selling or offering for sale, or attempting to sell or offer for sale, directly or indirectly, that certain tract of land 150 feet by 150 feet, or the building thereon known and described as the Oregon Short Line Passenger depot, located upon the northeast boundary of Front Street at the intersection of Twelfth Avenue South in the City of Nampa, Canyon County, Idaho, or any part of said land or building, and from executing, enforcing or satisfying, or attempting to execute, enforce or satisfy that certain order of sale of said premises issued by the District Court of Canyon County, Idaho, on June 8, 1922, in an action entitled F. O. McGill, doing business as the McGill Construction Company, plaintiff, against William G. McAdoo, Director General of Railroads, defendant, or that certain notice of sale of said premises on July 12, 1922, posted and published by defendant H. W. McKinney, as Sheriff of Canyon County, Idaho, in pursuance of said order of sale, and ordering and enjoining said defendants and each of them to cancel, vacate and quash said notice of sale issued, posted and outstanding.

OREGON SHORT LINE RAILROAD  
COMPANY, a corporation, Plaintiff.

By

GEORGE H. SMITH,  
H. B. THOMPSON,  
JOHN O. MORAN,  
*Its Attorneys.*

Endorsed, Filed June 28, 1922,  
W. D. McREYNOLDS, Clerk.  
By Pearl E. Zanger, Deputy.

---

(Title of Court and Cause.)

No. 998.

MOTION TO DISMISS.

The defendants move the Court for an order to dismiss this action on the following grounds, to-wit:

That the facts stated in the amended complaint as they appear upon the face thereof, do not entitle the plaintiff to the relief demanded.

Dated this 15th day of September, 1922.

G. W. LAMSON,  
*Attorney for Defendants.*  
Residence: Nampa, Idaho.

Endorsed, Filed Sept. 16, 1922,  
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

No. 998.

In Equity.

TEMPORARY INJUNCTION.

WHEREAS, in the above case plaintiff's motion

for a temporary injunction coming on for final hearing and disposition on this date, according to regular order of the Court, and it appearing from the amended bill of complaint herein that there is danger of great and irreparable injury being caused to plaintiff before final trial of this action, unless defendants are, pending such trial, restrained as herein set forth, and that plaintiff is entitled to a temporary injunction, therefore, and the Court, having fully considered said amended complaint and heard the arguments of counsel, and being fully advised in the premises,

NOW, THEREFORE, you, Defendants F. O. McGill and H. W. Kinney, and each of you, and your agents, servants and representatives, and all persons claiming by, through or under you, or either of you, are hereby restrained and enjoined from selling or offering for sale, or attempting to sell or offer for sale, directly or indirectly, on any date hereafter, that certain tract of land 150 feet by 150 feet or the building thereon known as the Oregon Short Line Passenger depot or station, located upon the northeast boundary of Front Street at the intersection of Twelfth Avenue, South, in the City of Nampa, Canyon County, Idaho, or any part of said land or building, and from executing, enforcing or satisfying, or attempting to execute, enforce or satisfy that certain order of sale of said premises issued by the District Court of Canyon

County, Idaho, on July 8, 1922, in an action entitled F. O. McGill, doing business as the McGill Construction Company, plaintiff, vs. William G. McAdoo, Director General of Railroads, defendant, or any other similar order of sale.

It is further ordered that Defendant H. W. Kinney, and his representatives, agents, and successors, be, and they hereby are, enjoined from posting or publishing any notice of sale of said premises in pursuance of said order of sale, so issued on July 8, 1922.

It is further ordered that plaintiff furnish an undertaking in due form of law in favor of the defendants, in the penal sum of One Thousand Dollars (\$1,000), said undertaking being by me approved this 26th day of September, 1922.

Dated September 26th, 1922.

FRANK S. DIETRICH,  
*United States District Judge.*

Endorsed, Filed Sept. 26, 1922.

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

No. 998.

ANSWER TO AMENDED COMPLAINT.

COME NOW the defendants, F. O. McGill and H. W. Kinney, and answering plaintiff's complaint herein, admit, deny and allege:



## I.

Admit all of the allegations in paragraph I contained.

## II.

Admit the allegations in paragraph II contained.

## III.

Admit all of the allegations in paragraph III of the complaint down to and including the sixth line from the bottom thereof and in answer to the last five lines of paragraph III, deny that the Oregon Short Line Railroad Company was not made a party to said action and deny that a summons or other process in said action was not served on the Oregon Short Line Railroad Company, but allege the facts to be that the Oregon Short Line Railroad Company, was made a party by virtue of process served upon the Agent of the Oregon Short Line Railroad Company at Nampa, Idaho, who was acting under Wm. G. McAdoo, Director General of Railroads, who was by Amended Complaint made defendant therein in behalf of the Oregon Short Line Railroad Company as provided by general order Number 50.

## IV.

Admit that Wm. G. McAdoo, Director General of Railroads, appeared by his attorneys and allege the facts to be that said defendant appeared in be-



half of the Oregon Short Line Railroad Company in his office as Director General of Railroads.

V.

Admit the allegations in paragraph V contained.

VI.

Admit the allegations in paragraph VI. contained.

VII.

Admit the allegations in paragraph VII contained.

VIII.

Answering paragraph VIII. Defendants admit, that an order of sale was procured for the sale of the Oregon Short Line Depot at Nampa and that the same was delivered to Defendant H. W. Kirney and that said property was advertised to be sold and notice of sale was given according to law and the sale was to be made under said order the 12th day of July, 1922. Deny that the value of said property is Sixteen Thousand Two Hundred Forty Dollars (\$16,240.00). Deny that any loss of property can accrue to plaintiff by reason of said sale and allege that plaintiff may redeem said property at any time by paying the amount of said sale plus ten per cent penalty.

IX.

In answer to paragraph IX, these defendants deny that the premises upon which depot is situated

are not subject to execution and sale by virtue of the laws of the United States of which the same were granted to the predecessor in interest of the plaintiff and in this regard allege that the authority of H. W. Kinney, Sheriff of Canyon County, who is one of the defendants in this case is granted by a judgment rendered in the case of McGill vs. McAdoo in the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County, which decree is directed by a decision of the Supreme Court of the State of Idaho, rendered on the 27th day of May, 1922, in the said action, reported at page 1057 of the 206th Pacific Reporter, dated March 25th, 1922. Deny that plaintiff now holds the said premises under a conditional grant limited for railway purposes and allege the facts to be that the ground adjoining the said premises occupied by said passenger depot consisting of a strip more than 50 feet wide and extending on either side of said building along the railroad for some 500 feet to the southeast and 500 feet to the northwest thereof, is now in use for parking purposes planted to grass and trees and is no way used for railroad purposes, and the same is not covered by any railroad tracks but is enclosed by a fence as private grounds and therefore subject to severance.

Further answering paragraph IX these defendants allege that the ground sought to be sold under said Order of Sale on the dates between 1875 and

1882 mentioned in said paragraph of the complaint and thereafter up to and including the year 1900 was vacant ground and that the building upon which the defendant, F. O. McGill, claims a lien which is sought to be foreclosed in the action entitled F. O. McGill vs. W. G. McAdoo was constructed in the year 1903 and that in the said action it has been decreed that because of labor and material performed and furnished by the said F. O. McGill, he, the said F. O. McGill, has acquired a valid lien against the said property and that the plaintiff in this cause, the Oregon Short Line Railroad Company, by its complaint and motion, seeks to stay the proceedings of the District Court of the State of Idaho, and that this action is therefore barred by the provisions of the Act of 1793 and of subsequent acts of the Congress of the United States and, particularly, of Section 1242, United States Compiled Statutes, 365 Judicial Code, and that the said action is not a proceeding in bankruptcy.

#### X.

Admit the allegations contained in paragraph X.

#### XI.

Answering paragraph XI defendants admit that the transportation act provides that no execution or process shall be levied upon the property of a Carrier while under Federal Control, but defendants allege further that it has been established that such

law only applies to cases where by such process the Director General would be deprived of the use of the Railroad and defendants further allege that at the time the said execution issued, the Director General was not in possession of and was not operating the Oregon Short Line Railroad.

## XII.

Answering paragraph XII deny that the state Court acquired no jurisdiction and deny that its decree is void as against the Oregon Short Line Railroad Company.

## XIII.

Answering paragraph XIII of the Complaint, defendants deny that Plaintiff has no plain adequate or speedy remedy at law but allege the facts to be that under the provisions of the Statutes of Idaho, possession of said property sought to be sold under said decree cannot be obtained during the equity of redemption provided for within one year from date of such sale and that plaintiff has a speedy remedy at law by appeal and has perfected an appeal of said action to the Supreme Court of Idaho and such appeal is now pending.

WHEREFORE, defendants pray that plaintiff take nothing by its complaint and that this action be dismissed; that defendants have judgment for all costs and reasonable attorney's fees for counsel employed in the defense of this action.



G. W. LAMSON,  
*Attorney for Defendants,*  
Residing at Nampa, Idaho.  
(Duly verified.)

Endorsed, Filed Oct. 21, 1922.  
W. D. McREYNOLDS, Clerk.  
By Pearl E. Zanger, Deputy.

---

(Title of Court and Cause.)

No. 998.

DECREE.

The above entitled cause came on for further hearing at this term and was argued by counsel; and thereupon, upon consideration thereof, and the Court being fully advised in the premises, it was ORDERED, ADJUDGED AND DECREED as follows:

That Defendants F. O. McGill and H. W. Kinney, and each of you and your agents, servants and representatives, and all persons claiming by, through, or under you, or either of you, be and hereby are restrained and enjoined from selling or offering for sale, or attempting to sell or offer for sale, directly or indirectly, on any date hereafter, that certain tract of land 150 feet by 150 feet or the building thereon known as the Oregon Short Line Passenger depot or station, located upon the northeast boundary of Front Street at the intersection of Twelfth Avenue South, in the City of



Nampa, Canyon County, Idaho, or any part of said land or building, and from executing, enforcing or satisfying, or attempting to execute, enforce or satisfy that certain order of sale of said premises issued by the District Court of Canyon County, Idaho, on July 8, 1922, in an action entitled F. O. McGill, doing business as the McGill Construction Company, plaintiff, vs. William G. McAdoo, Director General of Railroads, defendant, or any other similar order of sale.

It is further ORDERED that Defendant H. W. Kinney, and his representatives, agents and successors, be and they hereby are enjoined and restrained from posting or publishing any notice of sale of said premises in pursuance of said order of sale so issued on July 8, 1922, or of any other order of sale based upon that certain judgment of the Seventh Judicial District Court in and for Canyon County, Idaho, made and entered on or about June 5, 1922, in an action wherein F. O. McGill, doing business as the McGill Construction Company, is plaintiff and William G. McAdoo, Director General of Railroads, is defendant, and which purports to order and adjudge the foreclosure of a mechanic's lien.

It is further ORDERED AND ADJUDGED that plaintiff have and recover judgment against defendant F. O. McGill for its costs expended herein in the sum of \$43.47 and that execution issue therefor.

Dated February 17, 1923.

FRANK S. DIETRICH,  
*United States District Judge.*

Endorsed, Filed Feb. 17, 1923.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

---

(Title of Court and Cause.)

No. 998.

NOTICE OF APPEAL.

The above named defendants conceiving themselves aggrieved by the decision entered on the 17th day of February, 1923, in the above entitled proceeding doth hereby appeal from said decree to the Circuit Court of Appeals of the United States at San Francisco, California, and they pray that this appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made duly authenticated, may be sent to the Circuit Court of Appeals of the United States at San Francisco, California.

G. W. LAMSON,  
*Attorney for Defendants  
and Appellants.*

Allowed: Residing at Nampa, Idaho.  
FRANK S. DIETRICH,  
*Judge.*

March 14, 1923.

Endorsed, Filed March 12, 1923.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 998.

ASSIGNMENT OF ERRORS.

And now come F. O. McGill and H. W. Kinney, plaintiffs in error, and make and assign this their assignment of errors.

I. The District Court of the United States, for the District of Idaho, Southern Division, erred in refusing to dismiss the Complaint in this action for the reason that the action is barred by the provisions of Section 720, Revised Statutes of the United States.

II. The said Court erred in refusing to dismiss plaintiff's action for the reason that the Complaint shows upon its face that there was a plain, speedy and adequate remedy at law and that plaintiff was not entitled to injunctive relief.

G. W. LAMSON,

*Attorneys for Defendants  
and Appellants.*

Residing at Nampa, Idaho.

Endorsed, Filed March 12, 1923,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

---

(Title of Court and Cause.)

No. 998.

PRAECIPE.

For the purpose of the appeal in the above entitled cause, the defendants require that you pre-

part and have printed the record of the case and that such record include the following papers, copies of which are furnished herewith, to-wit:

The Amended Complaint, which includes Exhibits, A to J, inclusive.

Motion for Injunction

Motion to Dismiss

Temporary Injunction

Answer to Amended Complaint

Decree

Notice of Appeal

Assignments of Error

Citation

This Praecipe.

I offer to pay the costs of printing and certifying this record as soon as you can estimate costs.

Dated this 21st day of March, 1923.

G. W. LAMSON,

Attorney for Defendants,

Residing at Nampa, Idaho.

Endorsed, Filed March 21, 1923, W. D. McReynolds, Clerk. By Pearly E. Zanger, Deputy.

---

(Title of Court and Cause.)

No. 998.

CITATION.

United States of America,—ss.

To Oregon Short Line Railroad Company, Re-

spondent, and H. B. Thompson, Attorney for Respondent:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals of the United States at San Francisco, California, on the 23rd day of April, 1923, pursuant to an Appeal filed in the Clerk's office of the United States District Court, District of Idaho, Southern Division, wherein F. O. McGill and H. W. Kinney are Appellants and Oregon Short Line Railroad Company is Respondent, to show cause, if any be, why the Decree in the said appeal mentioned should not be reversed and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Frank S. Dietrich, United States District Judge, District of Idaho, this 24th day of March, in the year of our Lord One Thousand Nine Hundred Twenty-three.

FRANK S. DIETRICH,

District Judge.

Oregon Short Line Railroad Company, Respondent, acknowledges service by mail of the foregoing Citation this 28th day of March, 1923, but without waiver of any objections which it may have.

H. B. THOMPSON,

Attorney for Respondent.

Endorsed, Filed March 24, 1923, W. D. McReynolds, Clerk.



(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 77, inclusive, to be true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record here-amounts to the sum of \$89.20 and that the same has been paid by the appellants.

Witness my hand and the seal of said court, this 16th day of April, 1923.

W. D. McREYNOLDS,

(SEAL)

Clerk.



4440

—IN THE—

# UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

---

F. O. McGILL and  
H. W. KINNEY,  
Appellants,

vs.

OREGON SHORT LINE  
RAILROAD COMPANY,  
A Corporation,  
Appellee.

---

## BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United  
States for District of Idaho, Southern  
Division

---

G. W. LAMSON, Nampa, Idaho,  
Attorney for Appellants.

H. B. THOMPSON, Pocatello, Idaho,  
Attorney for Appellee.

FILED

U. S. DISTRICT COURT

IDAHO



—IN THE—  
**UNITED STATES CIRCUIT  
COURT OF APPEALS**

**For the Ninth Circuit**

---

F. O. McGILL and  
H. W. KINNEY,  
Appellants,

vs.

OREGON SHORT LINE  
RAILROAD COMPANY,  
A Corporation,  
Appellee.

---

**BRIEF OF APPELLANTS**

Upon Appeal from the District Court of the United  
States for District of Idaho, Southern  
Division

---

G. W. LAMSON, Nampa, Idaho,  
Attorney for Appellants.

H. B. THOMPSON, Pocatello, Idaho,  
Attorney for Appellee.



Page 28 Transcript.

Paragraph VII alleges the Oregon Short Line Railroad Company was the Owner and caused the building to be repaired.

The Prayer of the Complaint asks that a judgment be entered for the amount of the claim and that the building be sold to satisfy the judgment.

The case was tried without a jury and the first judgment was for Defendant.

Page 41 of the Transcript.

The Supreme Court of Idaho reversed this judgment with direction that the Lower Court enter judgment for Plaintiff in accordance with its opinion.

Page 43 of The Transcript.

McGill vs. McAdoo, 35 Idaho, 283  
206 Pac. 1057.

The Lower Court entered final judgment and order of Sale on the 5th day of June 1922.

Page 54 of the Transcript.

From this judgment, Wm. G. McAdoo, by the Attorneys, for Oregon Short Line Railroad Company served notice of Appeal but abandoned the appeal when the Federal Court issued the temporary injunction.

Page 70 Transcript, last paragraph of Answer.

The Order of Sale issued on the 8th day of June 1922.

Page 58 of the Transcript.

The Property was advertised for Sale to take place July 12th, 1922.

Page 60 of the Transcript.

The motion for a temporary injunction was filed in the Federal Court, June 28th, 1922.

Page 62 of the Transcript.

The Court at that time made a temporary order to prevent the Sale in the State Court, and the matter was held under various arguments before the Court until September 26th, 1922, at which time another temporary injunction issued.

Page 63 Transcript.

During this interim the Federal Court sustained defendant's motion to dismiss and plaintiff's Original Complaint was dismissed and the amended Complaint was filed September 15th, 1922, on which the Action proceeded and under which the permanent injunction issued.

Page 7 of the Transcript.

On page 63 of the Transcript is Appellant's Motion to dismiss on the grounds that the Amended Complaint does not state facts sufficient to entitle the Plaintiff to the relief demanded.

Appellant's answer raises various questions but as a statement of facts necessary for consideration of the assignments of error, it is only necessary to examine the last part of Paragraph IX on page 69 of the Transcript which states that the action is barred by the provisions of the Act of 1793 and subsequent acts of Congress of the United States, and

particularly Section 1242 which is Section 365 Judicial Code, and Section 720 U. S. Statutes, and that this is not a proceeding in Bankruptcy.

Also that Appellee has a plain, adequate and speedy remedy at law.

Page 70 Transcript, Paragraph XIII.

The Assignment of Errors are shown at page 74 of the Transcript.

---

## ARGUMENT

Section 720 U. S. Statutes is as follows:

“The writ of Injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State except in cases where such injunction may be authorized by any law relating to proceedings in Bankruptcy.”

It is contended by Appellee that the judgment upon which the execution and order of Sale issued is void, and on that account the Federal Court obtained jurisdiction to prevent the Sale, and that the prohibition named in Section 720, does not apply.

It is Appellant's contention that, this being an action in rem the rule does apply and that because of the general rule of Comety between the Federal and State Courts, the Appellee has mistaken its remedy and that if the judgment was void, the Court entering the judgment would have granted relief on proper motion or other proceedings in that Court or upon appeal. The judgment on its face and the order of sale show no defects.

The proceeding sought to be enjoined is one contemplated by section 720 and prior enactments including the Act of 1789.

“Sale of land by Sheriff under an execution issued out of a Kentucky Court of equity on a sale bond filed against the sureties thereon is a ‘proceeding’ within U. S. Statutes, Section 720, including injunctions by Federal Courts to stay proceedings in State Courts, except in certain cases. The Federal Court cannot enjoin such a sale even though the land levied upon belongs to a stranger to the proceeding.”

American Association Ltd. vs. Hurst et al  
59 Fed. Page 1.

“Except where otherwise provided by the Bankruptcy law the Courts of the United States are expressly prohibited by section 720 of the United States Statutes from granting a writ of injunction to stay proceedings in a State Court.”

Haines et al vs. Carpenter 91 U. S. Page 254

“A Court of the United States cannot enjoin proceedings in a State Court.”

Diggs and Keith vs. Wolcott,  
4 Cronch 179.

“A suit in the Federal Court to enjoin the further prosecution of an action in personam still pending in a State Court on the ground that the attempted service of process upon Defendant was lacking in due process of law, is forbidden by the provision of Judicial Code, Section 265, except in Bankruptcy Proceedings in any court of a state. Defendant’s



remedies are either a direct review in the Federal and Supreme Court of the final judgment of the State Court of last resort or a collateral attack upon the judgment. Congress has at all times commencing with the first judiciary act (Sept. 24th, 1789) maintained upon the Statute books such provisions as it deemed needful for reviewing judicial proceedings in the State Courts involving a denial of Federal rights but has confined them to a direct review by this Court and deferred this until final judgment or decree in the State Court of last resort. (The Emphasis is mine.)

At the same time since 1793 the prohibition of the use of injunction from a Federal Court to stay proceedings in a State Court has been maintained continuously and has been consistently held."

Essanay Film Mfg. Co. vs. Wm. R. Kane,  
42 Sup. Ct. Reporter—318.

The above case is the last expression of the Supreme Court on this question.

I am reminded that the chief contention of Appellee is, that the Federal Control Act and General Order No. 50 (War measures) provide that no process mense or final shall be levied against Railroad property under Federal control, and that the Oregon Short Line Railroad is not a party. This brings us to the question of an adequate remedy at law, and is covered by the decisions hereinbefore which provide that the harsh remedy of injunction should only be resorted to after a final decision of the Court of high-



est resort upon the merits of the judgment upon which mense process issued.

Without anticipating how this Court will view that question I wish briefly to touch upon a few points.

Federal Courts do not sit to review such judgments nor have they the right to do so.

Julian vs. Central Trust Co.,  
115 Fed. 956.

The Oregon Short Line Railroad Company was originally the only party and General Order Number 50 was not distributed generally among the attorneys. There is a provision in that order as follows:

“Where actions have been commenced in which the Railroad is named as defendant, the complaint shall be amended by substituting the name of William G. McAdoo, Director General.”

The Amended Complaint was filed to comply with the provisions of General Order No. 50, which states that all actions must be commenced against the Director General by name and not otherwise.

Mo. Pac. R. R. Co. et al. vs. Ault 257 U. S.,  
Vol. 41 Sup. Ct. 593.

Northern Pac. R. R. Co. vs. North Dakota,  
250 U. S. 135

McGill vs. McAdoo, 35 Idaho 283,  
206 Pac. 1057

General Order Number 50 as to procedure has some conflicting provisions and is hard to follow.

In the decisions above cited the courts are agreed

that the Railroad Company cannot be made a party and that in certain kinds of cases no money judgment can be entered against the Railroad Corporation while under Federal control.

It was held in *Geddes vs. Davis* (Idaho Case) 210 Pac. 584, that the finding of the jury that the Railroad Company was negligent, meant the Director General, as head of the Railroad Administration. So in the case of *McGill vs. McAdoo*, in which the Oregon Short Line is not named as a party because of the prohibition of General Order No. 50, and although the judgment runs against the Corporation, the Carrier Company, which is the Director General, is bound.

No case involving the foreclosure of a mechanic's lien against a Railroad Company, while under Federal control has been decided by the Courts, except the Idaho Case last above mentioned.

It was the intent of the Mechanic's lien law to grant an absolute lien upon the property to persons who perform labor or furnish material to be used in building or improvement of a structure and every person having charge of such building or of its alteration or repair shall be held to be the agent of the owner for the purpose of the lien law. This is especially true where the owner derives the benefit.

*Van Stone vs. Stillwell & B. Mfg. Co.* 142

U. S. 128

12 Sup. Ct. 181, 35 L. Ed. 961

*Hill vs. Twin Falls, etc. Water Co.* 22 Idaho  
274, 125 Pac 204

Sec. 7339 Idaho Compiled Statutes

But for Federal Control this action might have been brought against the Oregon Short Line Railroad in name.

In the case of *Mo. Pac. vs. Ault* 256 U. S. 554, 41 Sup. Ct. 593-65 L. Ed. 647 and many other cases, the Court's ruling is that the plain purpose of Sec. 10 Federal Control Act was to preserve to the general public the rights and remedies against Common Carriers, which it enjoyed at the time the Railroads were taken over by the President except in so far as such rights and remedies might interfere with the needs of Federal Operation.

General Order No. 50 provides no process mense or final shall be levied, etc.

There can be but one conclusion and that is that there is no bar to the action but it is not enforceible while the Railroad is under Federal Control.

In the case of *McGill vs. McAdoo* there was no attempt to enforce the judgment until June, 1922, more than one year after the Railroad was turned back to the corporation. The judgment was taken in June, 1922.

Appellant further contends that the question of whether or not the damage to the property has grown out of the possession, operation and control of the Railroad by the Director General is a controlling circumstance.

The injury was caused by the driving of a large automobile owned by Noble into the bay window of the passenger depot. The defense to the McGill suit was that Noble had hired McGill to make the repairs

and he (McGill) should get his pay from Noble. The repairs were not necessary for the operation of the Road by the Director General and the only person to be benefited was the Railroad Company: Now, who should pay McGill and has he a lien?

It is certain that this case is in a class by itself. If McGill can't sue the Railroad Company and has no lien because of Federal Control and the Director General was not the Agent of the Railroad for the purpose of the lien, where is the remedy?

The injury to the property was in the nature of a casualty, the same as a flood or a tornado in that neither the Railroad Company nor the Director General caused the injury by the operation of the Road and if construed in that way, the Supreme Court of Kansas has made the only decision which is yet unchallenged. A Railroad bridge was washed out by high water in Kansas while the railroad was under Federal Control. The bridge was reconstructed by the County. The County sued the U. S. Railroad administration and secured a judgment against the Railroad Company.

McPherson Co. vs. U. S. Railroad Administration 203 Pac. 912

In the opinion, the Court quoted Section 10 of the Federal Control Act and *Mo. Pac. R. R. vs. Ault*.

The Court stated further that the prohibition against rendering judgments against the Railroad while under Federal Control was not effective because The Cause arose during Federal Control, but was not caused by that Control. Nor did the Cause



of Action arise out of such control.

The Action was commenced Oct. 21, 1919, and the opinion further reads:

“At the time the bridge was washed out and at the time the action was commenced the railroad was under Federal Control, but since that time the railroad has been released from that Control and is now being operated by the Railroad Company.”

In the case at bar the facts are identical. The McGill judgment was entered in June, 1922. The Attorney for the Railroad and of the Director General were at all times one and the same person. So were the officers.

---

## AS TO THE EQUITY OF THE CASE

Upon an examination of the Opinion of the Court in the case of McGill vs. Wm. G. McAdoo it is not difficult to determine that the State Courts were aware of the Equities in favor of McGill, and I believe it is necessary to inquire now, why the Oregon Short Line Railroad Company should be permitted to receive, and enjoy the fruits of McGill's labor and the material he purchased, without due compensation and the same may be said of the U. S. Railroad Administration.

The rules of procedure in Courts governing actions involving the U. S. Railroad Administration, are war measures and were made for one purpose; to insure to the Government the exclusive use of the Railroads during the war, for war purposes.



They were justified. The war is over, and now it is within the province of Equity to correct that wherein the law is deficient, or more properly speaking, those harsh war rules that were law, only in time of war. I believe I have pointed out not only the law but the absolute justice that is due the appellant. The Appellee has made no effort to correct what it considers a wrong, in the Court where such wrong is alleged to have been perpetrated.

The injunction should be dissolved.

Respectfully submitted,

G. W. LAMSON,

Nampa, Idaho,

Attorney for Appellant.

---

Service by copy of the foregoing brief is hereby acknowledged this ..... day of ..... 1923.

.....,

Pocatello, Idaho,

Attorney for Appellee.

IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

F. O. MCGILL and H. W. KINNEY,  
Appellants,  
vs.  
OREGON SHORT LINE RAILROAD COMPANY,  
a Corporation,  
Appellee.

---

BRIEF OF APPELLEE

---

Upon Appeal from the District Court of the United  
States for the District of Idaho,  
Southern Division.

---

GEORGE H. SMITH,  
Residing at Salt Lake City, Utah,  
H. B. THOMPSON,  
JOHN O. MORAN,  
Residing at Pocatello, Idaho,  
Attorneys for Appellee.

G. W. LAMSON,  
Residing at Nampa, Idaho,  
Attorney for Appellants.

---

---



IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

F. O. McGILL and H. W. KINNEY,  
Appellants,  
vs.  
OREGON SHORT LINE RAILROAD COMPANY,  
a Corporation,  
Appellee.

---

**BRIEF OF APPELLEE**

---

Upon Appeal from the District Court of the United  
States for the District of Idaho,  
Southern Division.

---

**STATEMENT OF THE CASE**

This action was instituted by the appellee to enjoin the defendants, F. O. McGill and H. W. Kinney, from selling the passenger depot of the Oregon Short Line Railroad Company situated at Nampa, Idaho. McGill asserted his rights under a judgment of the State Court of Idaho foreclosing a mechanic's lien in his favor. The defendant Kinney, the county sheriff, was proceeding under color of an execution upon the judgment. The proposed sale was for the purpose of satisfying a judgment based upon a me-

chanic's lien for repairs to the depot building of the Oregon Short Line Railroad Company. The judgment was rendered in the District Court of Canyon County, Idaho, in a suit wherein F. O. McGill was plaintiff, and William G. McAdoo, Director General of Railroads, was the defendant. The Oregon Short Line Railroad Company was not a party to that suit nor subjected to the jurisdiction of the Court by any process. In the present action the Court below rendered judgment in favor of the Railroad Company and enjoined the sale of the property. From that judgment the appellants prosecute this appeal.

The proceedings of the State Court are set forth at pages 23 to 61, inclusive, of the Transcript herein. They consist of exhibits attached to the amended bill of complaint filed in the Federal Court, and their authenticity and correctness are not denied. From them it appears that on December 16, 1918, McGill filed a lien for materials furnished and labor performed in making repairs to the passenger depot of the Railroad Company. He set forth that the labor and material were furnished pursuant to a contract with the Oregon Short Line Railroad Company (p. 23); that the Railroad Company required the plaintiff to submit a bid, which he did, and which was accepted by the Railroad Company, and that upon the work being completed he notified the Oregon Short Line Railroad Company that the building was finished (p. 24). McGill sought to foreclose this lien in the State Court by an amended complaint appearing at pages 26 to 31, inclusive, of the Transcript. But for this purpose he sued only William G. McAdoo, Director General of Railroads, and did not make the owner of the property a party defendant. No jurisdiction over the Railroad Company was ac-



quired in the proceedings in the State Court, and there was no adjudication to which it was a party.

Upon the trial of the cause in the State District Court the issues were found in favor of the defendant upon the following grounds: First, that as a matter of law the Director General of Railroads was not the agent of the Railroad Company either for the purpose of contracting for a lien, or for any other purpose, and all other persons employed upon the railroad had been required to and had severed all relationship and agency to the corporation. Second, that the State Court could not, in conformity with the established constitutional principles of due process of law, render judgment establishing a lien against the property of a person who was not made a party to the suit, and hence would not have his day in court (pp. 36 to 42). McGill appealed to the Supreme Court of the State of Idaho and that Court, after quoting from the decision of *Missouri Pacific Railroad Company v. Ault*, 256 U. S. 554, and *Northern Pacific Railway Company v. North Dakota*, 250 U. S. 135, to the effect that "the Railroad Administration established by the President in December, 1917, did not exercise its control through the supervision of the railroad companies, but by means of a Director General," and that "by the establishment of the Railroad Administration and the subsequent orders of the Director General the carrier companies were completely severed from the control and management of their companies," paradoxically reversed and remanded the case "with instructions to proceed in accordance with the views herein expressed," (p. 52). The views expressed in those cases make it clear that the repairs on the depot had not been contracted for by any agent of the Railroad Company—

and without this no basis existed for a lien, even though the Court had jurisdiction of the company—but inasmuch as the cause was reversed and remanded the State District Court evidently concluded that the Supreme Court intended that judgment be rendered the other way, namely, in favor of the plaintiff, and rendered judgment accordingly (pp. 52-57), and the sheriff of Canyon County posted on the depot of the Railroad Company a notice that he would, on the 12th day of July, 1922, in obedience to said order, sell the depot of the Railroad Company, together with a tract of land 150 feet square on which the depot building was situated.

The Oregon Short Line Railroad Company thereupon filed in the United States District Court for the District of Idaho its original complaint and thereafter its amended complaint in equity, alleging that it was the owner of the premises; that it had ascertained that the foregoing proceedings had been had on the assumption that thereby a lien would be established against its property; that it had not been made a party to said action, had never been served with summons or other process, had never become a party thereto, and that jurisdiction of said Railroad Company in the action was never attempted to be obtained, or in fact obtained (p. 9). This was not denied (pp. 9 and 32), as indeed it could not be. In this action the Railroad Company alleged that the judgment constituted a cloud upon its title to the property and an apparent lien against the premises described in the complaint (p. 11), which was admitted (p. 34), and that defendant McGill had procured an order of sale to be issued out of the State District Court and had caused said order of sale to be delivered to the defendant Kinney, the sheriff of

Canyon County; that unless said defendants were restrained and enjoined by the order of the Court they would proceed to sell at public auction the plaintiff's depot and the premises upon which it was situated (pp. 12-13). This was also admitted (p. 34).

The various Acts of Congress upon which Federal Control of Railroads was based, beginning with the Act of Congress of August 29, 1916, and including the Act of March 21, 1918, together with various executive orders by which the plaintiff's railroad had been taken from its possession, operation and control by the United States Railroad Administration, were pleaded, and it was alleged that thereupon and thereby "the Railroad Company's premises were for all purposes taken wholly from and without the operation, management and control of the plaintiff and replaced by the complete possession of Governmental authority; that by the establishment of the Railroad Administration and subsequent orders of the Director General of Railroads appointed by the President, the carrier companies, including the plaintiff, were completely separated from the control and management of their systems, and the managing officials and all persons employed on said line of railroad of the plaintiff were, by the United States Railroad Administration Bulletin No. 4, pages 113, 114 and 313, 'required to sever their relation with the particular companies and to become exclusive representatives of the United States Railroad Administration.'" It was further pleaded that the "plaintiff herein was thereby relieved from all liability on account of anything that might be said or done by any person connected with the operation, management or control of said system of railroad at any time



during the year 1918, and none of said persons were the agents, servants or employees of this plaintiff, and that by reason of the nature and ownership thereof the foregoing property of this plaintiff cannot be taken from the plaintiff and sold except in violation of those provisions of the Constitution guaranteeing to the plaintiff the equal protection of the laws, and providing that no person shall be deprived of his property except by due process of law" (pp. 17-19). These allegations were not traversed or denied, and hence must conclusively be deemed admitted. It was further pleaded that by the Act of Congress approved February 28, 1920, "no execution or process other than on a judgment recovered by the United States against a carrier shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or any system of transportation by the President under Federal control." This was not denied, but in any event the Court would take judicial knowledge thereof. It was further pleaded that the execution or order of sale by which defendants were proposing to sell the plaintiff's property grew out of the possession, use, control and operation of said line of railroad by the President under Federal control and that such sale or attempted sale was in violation of the rights accorded to the plaintiff by the provisions of said law. None of these averments were traversed or denied and must be taken to be true. Again it was alleged that on account of the foregoing facts and the further fact that the depot was situated upon a Government grant of right of way and a necessary and inseparable part of a complete system of interstate transportation (pp. 14-16), the defendants were without right or authority to levy upon or sell

said premises under execution or otherwise, and said judgment constituted a cloud as of an apparent lien upon the title to the premises, and would continue to do so unless removed by the judgment or decree of a competent court having jurisdiction thereof, and that the said United States District Court possessed such jurisdiction and authority. These averments, so far as the essential facts are concerned, were not denied, and hence for the purpose of this appeal, and every other purpose, must be taken as stipulated to be true.

The only defense or justification the defendants interposed is contained in the somewhat novel and anomalous statement in their answer as follows:

“Deny that the Oregon Short Line Railroad Company was not made a party to said action, and deny that a summons or other process in said action was not served on the Oregon Short Line Railroad Company, but allege the facts to be that the Oregon Short Line Railroad Company was made a party by virtue of process served upon the agent of the Oregon Short Line Railroad Company at Nampa, Idaho, who was acting under William G. McAdoo, Director General of Railroads, who was by amended complaint made defendant therein, in behalf of Oregon Short Line Railroad Company as provided by General Order No. 50.” (p. 66).

Preceding the filing of answer to the amended complaint the defendants interposed a motion to dismiss on the ground “that the facts stated in the amended complaint as they appear on the face thereof do not entitle the plaintiff to the relief demanded” (p. 63). This motion did not go to the jurisdiction of the Court, but merely to the insufficiency of the complaint.



As already stated, upon the foregoing admitted and established facts the Court below rendered judgment in favor of the Railroad Company. It is to review that judgment that this appeal has been prosecuted.

---

## ARGUMENT

### I.

#### THE COURT HAD JURISDICTION TO ENJOIN THE SALE.

The appellant contends that the Court below had no jurisdiction to grant the relief sought because of those provisions of Section 720, United States Statutes, which provide as follows:

“A writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.” (Judicial Code, Section 265, 2 U. S. Compiled Statutes Annotated, Section 1242).

Notwithstanding the provisions of this section, however, a Federal Court has jurisdiction to enjoin individuals from enforcing a final judgment whenever such parties should, in equity, be barred from enforcing the judgment either because of fraud or for want of due process of law in acquiring jurisdiction. That is the situation in this case. That a Federal Court may enjoin the enforcement of a final judgment of the State Court under appropriate facts and circumstances is amply sustained and settled.

This principle was applied to a very similar state of facts indistinguishable in principle from those in the case at bar in the suit of Ephraim Simon v. Southern Railway Company, 236 U. S. 115. There it was held that while Section 720, Revised Statutes, prohibits United States Courts from staying proceedings in a State Court, the Act does not prevent Federal Courts from depriving a party of the fruits of a fraudulent judgment, nor from enjoining a party from using that which he calls a judgment but which is in fact and in law a mere nullity and absolutely void for lack of service of process, and that United States Courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment that has been obtained by fraud or without service. In that action the plaintiff Simon brought suit against the Southern Railway Company in the Civil District Court for the Parish of Orleans in Louisiana to recover damages for personal injuries alleged to be due to the negligence of the defendant while the plaintiff was riding as a passenger between Selma, Alabama, and Meridian, Mississippi. Availing himself of the state statute, which provided that every foreign corporation doing business in the State of Louisiana should designate in writing the places in the state where it was doing business and name an agent upon whom process might be served, and that whenever such company did any business in the state without having complied with these requirements it might be sued for any legal cause of action in any parish of the state where it may do business, and that service might then be made upon the Secretary of State, he commenced the action without notice to the company other than that arising from the purported service in pursuance of the statute upon the Secretary of State. The summons was directed to

the Southern Railway Company through Hon. John W. Michel, Secretary of State of Louisiana. No notice was given to the railway company of the service of the citation or of the fact that suit had been begun, and it made no appearance. Judgment by default was taken, proof introduced and a verdict rendered against the company upon which judgment was entered. After learning of the existence of the judgment the railway company, averring itself to be a citizen of Virginia, filed suit in the United States Circuit Court for the District of Louisiana against Simon, a citizen thereof, asking that he be perpetually enjoined from enforcing the judgment. The bill further alleged that the Southern Railway was not doing business in the State of Louisiana; that the service upon the Secretary of State was null and void; that the judgment was obtained without any citation or summons being served upon it, and that the judgment was obtained upon false testimony. In holding that no valid service of process had been made upon the railway company and that the judgment was void the Supreme Court of the United States said:

“The primary question whether the United States court had jurisdiction of the case must, of course, be determined by considering the allegations of the bill. It shows diversity of citizenship, and charges that Simon was seeking to enforce by levy a judgment obtained by fraud and without notice to the railway company. If that be so, the United States courts, by virtue of their general equity powers, had jurisdiction to enjoin the plaintiff from enforcing a judgment thus doubly void. For even where there has been process and service, if the court ‘finds that the parties have been guilty of fraud in obtaining

a judgment . . . it will deprive them of the benefit of it.' *McDaniel v. Traylor*, 196 U. S. 415, 423, 49 L. Ed. 533, 537, 25 Sup. Ct. Rep. 369. Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant 'can no more be regarded as a party than any other member of the community.' Such judgments are not erroneous and not voidable, but, upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who, if concerned in executing such judgments, is considered in law as a mere trespasser. *Harris v. Hardeman*, 14 How. 339, 14 L. Ed. 446 (default judgment entered on improper service); *Williamson v. Berry*, 8 How. 541, 12 L. Ed. 1189; *Scott v. McNeal*, 154 U. S. 46, 38 L. Ed. 901, 14 Sup. Ct. Rep. 1108; *Western Life Indemnity Co. v. Rupp*, 235 U. S. 273, *ante*, 224, 35 Sup. Ct. Rep. 37.

"On principle and authority, therefore, a judgment obtained in a suit of which the defendant had no notice was a nullity and the party against whom it was obtained was entitled to relief."

The case of *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, was a suit in equity brought about by the express company against Taylor in the District Court of the United States for the Northern District of Mississippi. The bill alleged that in suing the railroad company and obtaining a judgment against it, which, as between the railroad company and the express company must be paid by the latter because of the stipulation in its contract with the railroad company, Taylor not only violated his agreement with



the express company but perpetrated a legal fraud on that company; that the judgment was therefore one which, in equity and good conscience, he had no right to enforce, and if Taylor were permitted to enforce it the express company would be without any effective remedy; that the express company, which was not a party to the suit and which had not been in any wise negligent or at fault, was in equity and good conscience entitled to have the messenger agreement respected and have the claims embraced in the inequitable judgment released and the enforcement of the judgment enjoined. In discussing the effect of Section 720, United States Revised Statutes, above referred to, the Court said:

“As with many other statutory provisions this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal court from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (citing cases) or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat, or impair it through proceedings in the state courts (citing cases), or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience. (Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870, 12 Sup. Ct. Rep. 62; *Ex Parte Simon*, 208 U. S. 144, 52 L. Ed. 429, 28 Sup. Ct.



Rep. 238; *Simon v. Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492, 35 Sup. Ct. Rep. 255; *Public Service Co. v. Corboy*, 250 U. S. 153, 160, 63 L. Ed. 905, 908, 39 Sup. Ct. Rep. 440; *National Surety Co. v. State Bank*, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593)."

Appellants at page 8 of their brief cite *Essanay Film Manufacturing Company v. Kane*, 258 U. S. 358, 42 Sup. Ct. Rep. 318, 66 L. Ed. 658, as an authority in their favor, and say this is the last expression of the Supreme Court on this question. In this reference it seems quite clear that appellants overlooked the well recognized distinction made in that case between a stay of proceedings before final judgment and the right to enjoin the enforcement of an inequitable judgment or one in which there has not been due process of law in acquiring jurisdiction. On this point the Court in that case said:

"In this court, as in the courts below, appellant's chief reliance is upon *Simon v. Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492, 35 Sup. Ct. Rep. 255. Without intimating that, in other respects, the cases are parallel, it is a sufficient ground of distinction that this is an attempt to use the process of the Federal court to restrain further prosecution of an action still pending in a state court, while that cited was a case enjoining a successful litigant from enforcing a final judgment of a state court, held void because procured without due process. As was pointed out in that case, pages 123 *et seq.*, the prohibition originated in the Act of Congress of March 2, 1793 (1 Stat. at L. 334, Chap. 22, Sec. 5, Comp. Stat., Sec. 1239), was based upon principles of comity, and designed to avoid inevitable and irritating conflicts of jurisdiction. But when the litigation in the state court has

come to an end and final judgment has been obtained, the question whether the successful party should, in equity, be debarred from enforcing the judgment, either because of his fraud or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a Federal court without the conflict which it was the purpose of the Act of 1793 to avoid."

Appellants also cite the case of *American Association v. Hurst*, 59 Fed. 1, which appears to support their contention. In view of the decisions of the United States Supreme Court to which reference has been made, it becomes immaterial whether this case is in point or not, but in any event it has been overruled by the very court that decided it. In the case of *Union Railway Co. v. Illinois Central Railroad Co.*, 207 Fed. 745, decided in 1913, the Sixth Circuit Court of Appeals held:

"A suit in a Federal court by one railroad company against another to prevent the latter from obtaining the benefit of a judgment in a state court, authorizing it to construct a grade crossing over complainant's railroad on the ground that it would be inequitable was not a suit to obtain a decree acting on the state court nor forbidding action in that court, and was, therefore, not within the prohibition of Judicial Code. Sec. 265 (Act March 3, 1911, C. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, page 236]; Rev. St., Sec. 720 [U. S. Comp. St. 1901, page 581]), forbidding, except in a single case, the granting of an injunction by any court of the United States to stay proceedings in a state court."

In the course of the opinion the Court said:

“(1, 2) This appeal presents the broad question whether a court of equity, upon the case here presented, may lawfully forbid a railroad company crossing at grade the right of way and tracks of another railroad company under the authority of the Tennessee statutes. We set aside as without merit the contention that the decree complained of violates Section 265 of the Judicial Code (formerly Section 720 of the Rev. Stat. [U. S. Comp. Stat. 1901, page 581]), which forbids, except in the single case there stated, the granting of injunction by any court of the United States to stay proceedings in any court of a state. The decree does not act upon the state court, nor does it in terms forbid action in that court. It in effect seeks to prevent appellant from obtaining the benefit of a judgment claimed to be inequitable. The existing diversity of citizenship between the parties gave to the Federal court precisely the same jurisdiction as vested in a court of equity of the State of Tennessee. In other words, appellee is entitled in the Federal courts to the relief obtainable in the state court, but to no greater relief. *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 9 Sup. Ct. 237, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 599, 12 Sup. Ct. 62, 35 L. Ed. 870; *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; *Ewing v. City of St. Louis*, 5 Wall. 413, 419, 18 L. Ed. 657; *Bank of Kentucky v. Stone* (C. C. 6th Cir.), 88 Fed. 383, 398.”

In the case of the United States Railroad Administration, *McAdoo, Director General, v. Burch, Sheriff*, 254 Fed. 140, it is shown that the railroad company may assert its own rights in circumstances like the instant case, even though the Director General of Railroads might not be able to maintain a suit to prevent the enforcement of the judgment. It is there

stated that such rights rest upon the usual principle upon which a court of equity will enjoin the enforcement of a judgment. It was held that under the Act of August 29, 1916, authorizing the President in time of war to take possession of the railroads, the Director General of Railroads was not authorized to take possession of land belonging to a railroad company which was not used in its business as a carrier, and in consequence the sale of such land under execution against the railroad company would not be enjoined on the suit of the Director General where the railroad company made no opposition. In discussing the question the Court said:

“The question whether or not final process can be levied against this property is one that arises under the very terms of the Act of March 21, 1918; nor is the position that this court has no jurisdiction to stay the execution of a judgment recovered in the state court well taken. It has been laid down that the United States courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state court upon the usual principles under which courts of equity will enjoin the enforcement of a judgment. *Simon v. Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; *Union Ry. Co. v. Illinois Cent. R. Co.*, 207 Fed. 745, 125 C. C. A. 283; *Schultz v. Highland Gold Mines Co. (C. C.)*, 158 Fed. 337; *Linton v. Safe Deposit & Title Guaranty Co. (C. C.)*, 147 Fed. 824.

“Further, the special statutory exemption from process, created by the Act of 21st March, 1918, must be construed, in connection with the provision of Section 265 of the Judicial Code of the United States (formerly Section 720, U. S. R. S., Comp Stat. 1916, Sec. 1242), as modify-



ing the language of that section, and creating another exception, under which the attempted enforcement of the mesne and final process from a state court may be restrained in proper cases."

This decision was rendered prior to the passage of the Transportation Act of 1920, and in view of the provisions of that Act that "no execution or process other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control," the last paragraph quoted from the opinion becomes squarely applicable to the case at bar. The only difference between that case and the one at bar is the designation of the particular Act of Congress creating the special statutory exception. By whatever name or description the exception exists in both instances.

See also:

Julian v. Central Trust Co., 115 Fed. 956;

National Surety Co. v. State Bank of Humboldt, Neb., 120 Fed. 593;

Chicago R. I. & P. Ry. Co. v. Callicotte, 267 Fed. 799;

Pierce v. National Bank of Commerce in St. Louis, 268 Fed. 487;

Schultz v. Highland Gold Mines Co., 158 Fed. 337;

Linton v. Safe Deposit & Title Guaranty Co., 147 Fed. 824.



It is apparent upon reason and the authority of adjudicated cases that the Court below correctly held jurisdiction existed to grant the relief sought. It is equally clear that the plaintiff was entitled to that relief. The right to the remedy granted cannot be better stated than it was by the Court below, as follows:

“We therefore have a case where an owner in the rightful possession of its property is confronted with a decree of record, rendered in a suit to which it was not a party, in favor of a third person, and execution process issued thereon, together with the threat that unless a substantial amount of money is paid the property will be sold, and the owner’s title thereto further clouded by the sheriff’s certificate of sale and deed, and with the prospect of a deficiency judgment upon which execution process may be issued against it. The other requisite jurisdictional facts being present, is a Federal court without the power, because of the statutory provision above quoted, to remove the cloud already existing by virtue of the void decree and to enjoin the execution of void process which would still further cloud the title, and ultimately result in dispossessing the owner, by means of the writ of assistance provided for in the decree?

“If the plaintiff cannot have such protection, how is it to procure adequate relief? If it were a party in the suit in the state court a clear course would be open to it, but not being such a party it has no standing there to seek for a modification of the decree or for review of it by other courts. As defendant in that suit the Director General has no real interest, and even if he had the inclination, he is without the requisite standing to enable him to assert the rights of the railroad corporation.”

## II.

## THE COURT HAD JURISDICTION UNDER THE TRANSPORTATION ACT.

The Federal Court in this action possessed jurisdiction under the substantive provisions of paragraph (g), Section 206 of the Act of Congress approved March 1, 1920, commonly called the Transportation Act (41 U. S. Stat. at Large 462), to enjoin the enforcement of the execution under which it was attempted to sell the depot in question.

This statute provides:

“No execution or process, other than a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under federal control.”

In the case of Seaboard Air Line R. Co. v. Fowler, Sheriff, et al., 275 Fed. 239, the railway company filed its bill to enjoin the plaintiffs from enforcing, by execution, the sale of property of the railway company. The causes of action on which the judgments were based arose while the railroad was under the control of and being operated by the President of the United States through the Director General of Railroads. An injunction was sought upon the ground that the causes of action arose while the railroad was under Federal Control, although the suits were brought after the railroad had been returned to its owners. The railroad's prayer for an injunc-

tion against the plaintiffs and the sheriff was founded on paragraph (g), Section 206 of the Transportation Act of March 1, 1920, above quoted. The Court held that the judgment of the State Court against the railway company on a cause of action which arose while the railroad was under Federal Control was a nullity, and its enforcement by execution should be enjoined by a Federal Court of Equity on the ground that its enforcement would be a taking of property without due process of law regardless of the amount involved.

### III.

#### THE DIRECTOR GENERAL ACTING UNDER THE PROCLAMATION OF THE PRESIDENT DID NOT REPRESENT THE RAILROAD COMPANY.

It would seem unnecessary to discuss or elaborate upon the question that since the President's proclamation of December 26, 1917, under authority of the Act of Congress of August 29, 1916, the railroad corporations were excluded from the operation of the roads, and that the Railroad Administration established by the President in December, 1917, did not exercise control of the carriers through supervision of the owner railroad companies. This has been many times decided and was long since established law. An enumeration of some of the decided cases, however, are as follows:

Northern Pacific Ry. Co. v. North Dakota,  
250 U. S. 135;

Missouri Pacific R. Co. and W. D. Hines,  
Director General, v. Ault, 256 U. S. 554;

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566;

Western Union Telegraph Co. v. Poston, 256 U. S. 662;

Globe & Rutgers Fire Ins. Co. v. Hines, 273 Fed. 774.

The contention made in the instant case that the Railroad Company was before the Court in any manner or subjected in any way to process by or through the Director General is without any shadow of merit. The judgment of the State Court against the Railroad Company was in consequence a naked nullity.

#### IV.

### THE JUDGMENT OF THE STATE COURT WAS VOID UNDER THE STATE MECHANIC'S LIEN LAW.

The State statute of Idaho provides that:

“Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any building, railroad . . . has a lien upon the same for the work or labor done or material furnished, whether done or furnished at the instance of the owner of the building . . . or his agent; and every contractor, sub-contractor, architect, builder, or or any person having charge of . . . the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter.”

Comp. Stat. of Idaho, Sec. 7339.



It will be observed that the establishment of the lien under this statute rests upon labor having been done or material furnished at the instance of the owner of the building or his agent. It is not claimed that the material was furnished or labor performed at the instance of or request of anyone except by persons in the employ of and representing the United States Railroad Administration. This is established by the pleadings. On the authorities, therefore, above cited, and particularly *Northern Pacific Railway Company v. North Dakota*, 250 U. S. 135, and *Missouri Pacific Railway Company v. Ault*, 256 U. S. 554, it is put beyond doubt that such persons did not represent the railroad company and had no authority to contract for or on its account. In the *Ault* case the Supreme Court of the United States said:

“By establishment of the railroad administration and subsequent orders of the Director General the carrier companies were completely separated from the control and management of their systems, managing officials were ‘required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.’ U. S. R. R. Adm. Bull. No. 4, pages 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bull. No. 4, page 168, Sec. 5, 198 *et seq.*, 330 *et seq.* It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies, as their interest in and control over the systems were completely suspended.”

And in the case of *Northern Pacific R. Co. v. North Dakota*, *supra*, the same Court said:



“No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President asserting the power given, and the Act of 1918 dealing with the situation created by the exercise of such authority that no divided but a complete possession and control was given the United States for all purposes as to the railroads in question. . . . How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take. The financial obligations under which it came and all the other duties and exactions which the Act imposed contemplate one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing.”

It is also an established principle that a lessee is not an agent of the owner for the purpose of lien laws, the general rule on this subject being expressed thus:

“A tenant whose lease requires him to make repairs at his own expense is not within a statute providing that every person having charge of repair of any building shall be held to be the agent of the owner for creation of mechanic’s liens on the property.”

Wilson v. Gevurtz, et al., (Ore.), 163 Pac. 86;

L. R. A. 1917D, page 575 and note.

“While a proceeding to foreclose a mechanic’s lien is in its essential nature *in rem*, it is not a

proceeding whereby property alone is made defendant in an action to foreclose, and the owner must be made a party if his property is to be charged with the claim for which the lien is given."

Los Angeles County v. Winans (Cal.), 109 Pac. 640.

Even assuming for the purpose of argument that work was performed and material furnished under a lien law like the one in question at the instance and request of the owner or his authorized agent, it still remains true that the lien could not be enforced without making the owner of the property a party to the suit to foreclose the lien. Such procedure would be inconsistent with the principle of due process of law so firmly established in our constitutional jurisprudence. If there is any one principle well established in the country under State and Federal constitutions it is that no man's property or legal rights can be adjudicated or affected by a judgment in any judicial proceedings of any kind or character wherein he has not been subjected to legal process by which the Court has secured jurisdiction of his person or his property. No reference to authorities is necessary, and the principle will not be denied—it is part and parcel of the woof and warp of our constitutional history and the development of our jurisprudence. The undisputed facts in this action show that this Railroad Company was not a party to the judgment, its rights were not heard or determined, it had no day in court on the foreclosure of this lien, and any attempt to take away its property under the circumstances was without the slightest semblance of the test of compliance with the principle of due process of law. The judgment of the lower Court in protect-

ing the rights of this property owner by enjoining the sale of its property under the circumstances was not only justified but every principle of equity and good conscience cried aloud for the relief prayed for and granted.

And finally, a further independent reason why the sale of the depot and the right of way upon which it was situated should have been enjoined by the Federal Court is that the franchise of a railroad property and corporate property essential to the enjoyment of the franchise (especially a right of way grant by the Government, which is not a grant of an unqualified fee) are not subject to sale or execution unless the Legislature authorizes or assents to the transfer, and that a sale shall not be made of units or parcels of such property necessary to the complete enjoyment of the franchise.

1 Elliott on Railroads (3rd. Ed.), Sec. 596, citing:

Gue v. Tidewater Canal Co., 24 How. 257, 16 L. Ed. 635;

East Ala. R. Co. v. Doe, 114 U. S. 340, 29 L. Ed. 136;

See also O. S. L. R. R. Co. v. Quigley, 10 Idaho 770, 80 Pac. 401, 405, viz:

“This grant by Congress of a right of way is not an absolute fee for all purposes, but is in the nature of a conditional grant, and limited to the use and occupation by the grantee and its successors and assigns for the purpose of maintaining and operating a railroad. The franchise and right of way in such case are inseparably at-

tached to each other while in the possession and under the management and control of the grantee and its successors."

That the judgment decree of the District Court should be affirmed is

Respectfully submitted,

GEORGE H. SMITH,

H. B. THOMPSON,

JOHN O. MORAN,

Attorneys for Appellee.

# In the United States Circuit Court of Appeals for the Ninth Circuit

F. O. MCGILL and H. W. KINNEY,

*Appellants,*

vs.

OREGON SHORT LINE RAILROAD COM-  
PANY, a corporation,

*Appellee.*

## PETITION FOR REHEARING

Upon Appeal from the District Court of the  
United States for the District of Idaho,  
Southern Division.

GEORGE H. SMITH,

Residing at Salt Lake City, Utah.

H. B. THOMPSON,

JOHN O. MORAN,

Residing at Pocatello, Idaho,  
Attorneys for Appellee.

G. W. LAMSON,

RALPH M. BRESHEARS,

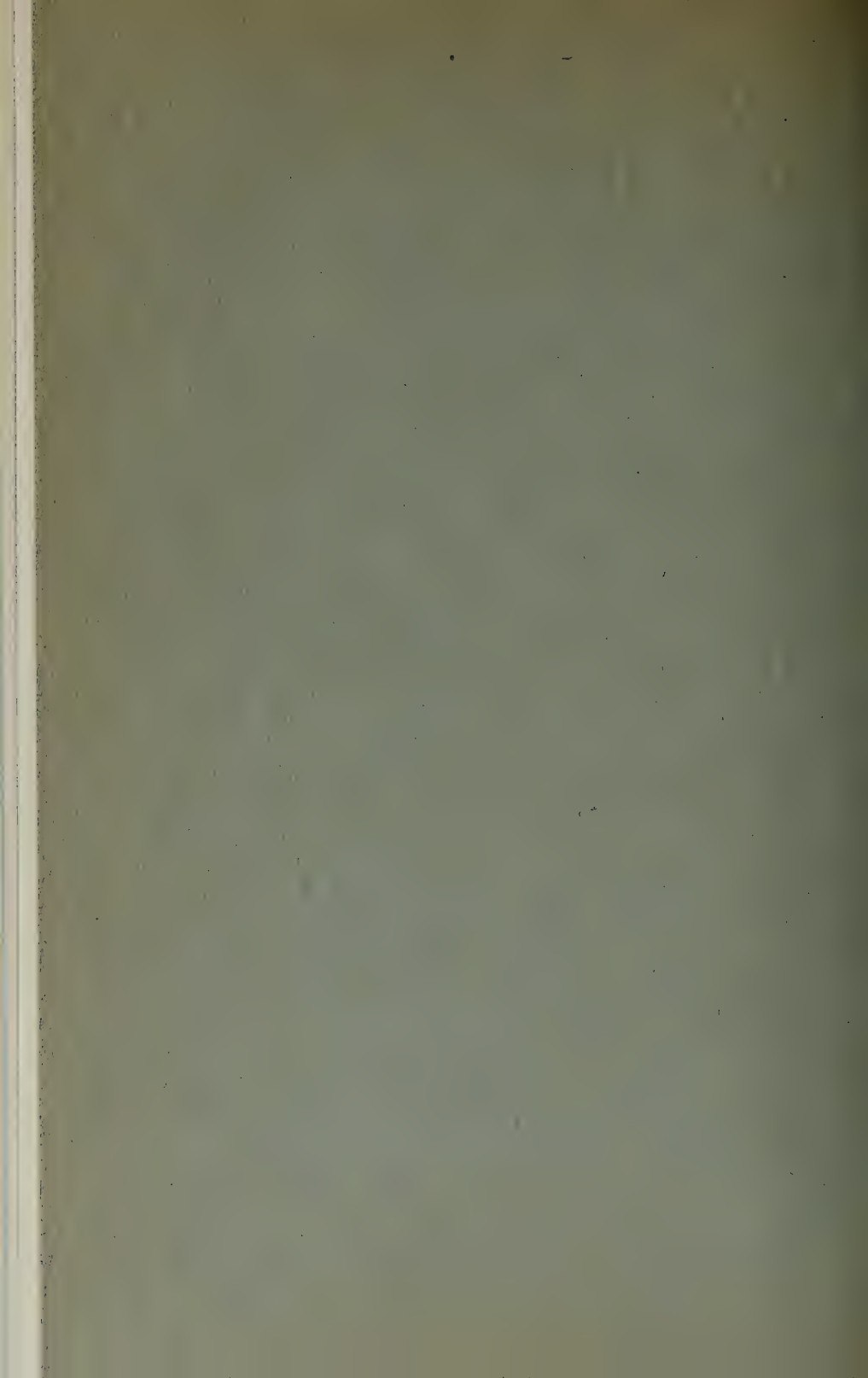
Residing at Nampa, Idaho,  
Attorneys for Appellants.

FILED

FEB - 1907

F.D. 200-1000





# In the United States Circuit Court of Appeals for the Ninth Circuit

---

F. O. MCGILL and H. W. KINNEY,	}	<i>Appellants,</i>
vs.		
OREGON SHORT LINE RAILROAD COM-	}	<i>Appellee.</i>
PANY, a corporation,		

---

## PETITION FOR REHEARING

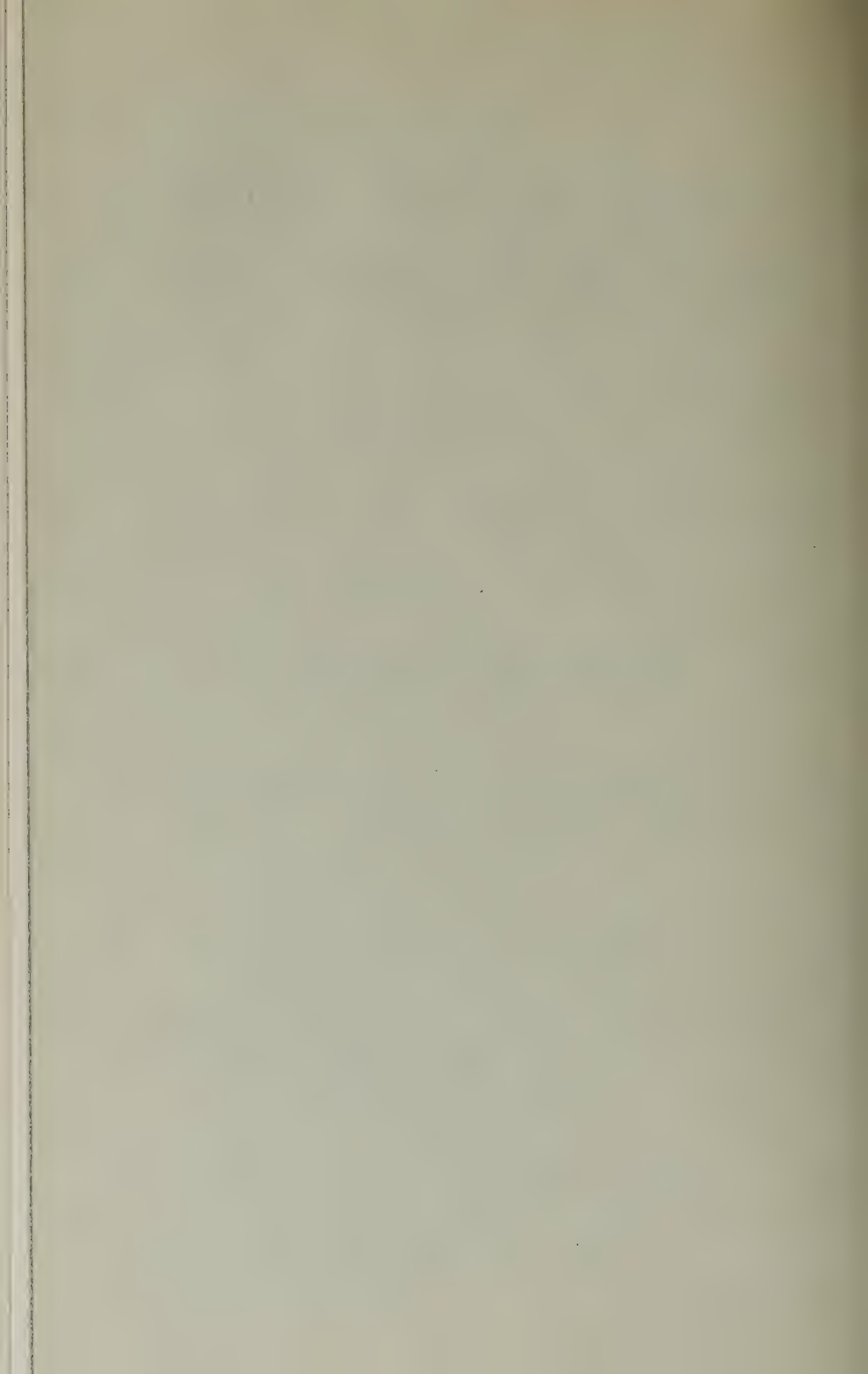
---

Upon Appeal from the District Court of the  
United States for the District of Idaho,  
Southern Division.

---

GEORGE H. SMITH,  
Residing at Salt Lake City, Utah.  
H. B. THOMPSON,  
JOHN O. MORAN,  
Residing at Pocatello, Idaho,  
Attorneys for Appellee.

G. W. LAMSON,  
RALPH M. BRESHEARS,  
Residing at Nampa, Idaho,  
Attorneys for Appellants.



To the Honorable Judges of the United States  
Circuit Court of Appeals for the Ninth Cir-  
cuit:

The Oregon Short Line Railroad Company, a corporation, appellee herein, respectfully petitions the Court for a rehearing of the above entitled cause, and as grounds for the reconsideration and rehearing of said cause respectfully submits that said petition for rehearing should be granted and allowed and the judgment of the lower court affirmed for the following reasons, to-wit:

1. Under the mechanic's lien law of the state of Idaho, upon which the appellant McGill bases his right of recovery, it was necessary for the plaintiff to plead and prove that the work, labor or material were furnished at the instance of the owner or his agent, and such fact was not established, and this Court in rendering its decision on the appeal has overlooked that point, which was made by your petitioner upon said appeal, and has omitted discussion thereof.

2. The agents, servants and employees of the United States Railroad Administration were not the agents, servants or employees of the carrier corporation, the Oregon Short Line Railroad

Company, but were "required to sever their relation to the particular companies and to become exclusive representatives of the United States Railroad Administration" (Mo. Pac. R. Co. vs. Ault, 256, U. S. 554, 557), and this Court erred in rendering its decision in holding that it was immaterial that the railroad company, upon whose property the lien was sought to be established, was not a party for the reason that "he (the Director General) was managing it and controlling it in the interests of the appellee, and operating it through the appellee's agents, officers, attorneys and employees."

3. The railroad corporation remained a responsible legal entity against which, as sole defendant, the lien, if valid, could be enforced, notwithstanding the provisions of section 10, Act of Congress, approved March 21, 1918, or any other federal statute or regulation, and said lien could not otherwise be established consistently with due process of law.

We will present these points in <sup>the</sup> order in which they have been assigned.



## I.

The mechanic's lien law of Idaho (section 7339 Idaho Compiled Statutes) is a very brief one quoted at page 21 of our original brief filed herein, and provides for the establishment of a lien only when (whether) the labor or material is "done or furnished at the instance of the owner of the building \* \* \* or his agent." There is no provision in the Idaho laws relative to disclaimer such as exists under the California statutes.

In construing this statute the Idaho Supreme Court in 1899 in the case of Idaho Gold Mining Company vs. Winchell, 59 Pac. 533, held:

"Where one unlawfully ousts the owner from mining claims and in working the same creates debts, such debts are not legal claims for liens against the mining claims."

We quote from the statement of facts as follows:

"The following facts appear from the record. \* \* \* That on or about July 15, 1895, said Union Company, claiming possession of said property under and by virtue of said forfeited option, entered upon said property and unlawfully ousted appellant therefrom and unlawfully held possession thereof from that date until about January 1, 1897. That during the time that said Union Company so

held possession of said property, the respondent Winchell furnished wood to said last mentioned company, which was used by said company in operating the mill situated on said property, and in working said mines. \* \* \* Thereupon some of the creditors, and among them the respondent, attempted to file liens against said property, thus attempting to hold the property for the sums due them."

After quoting the statute, which provides that the persons performing the labor or furnishing material as therein specified shall have a lien "for the work or labor done or material furnished whether done or furnished *at the instance of the owner* of the building or other improvement, or his *agent*," the court said:

"We do not think said act was intended to include a transaction like the one in the case at bar. If a person or corporation can unlawfully take and hold possession of the property of another and create liens against it, as was done in this case, an owner may be deprived of his property without his consent and without due process of law. Had the Union company gone into possession of said property with the consent of the appellant, then a very different question would be presented."

This Court, of course, judicially knows that the United States government did not go into possession of the appellee's property with its consent, but went into possession by force and authority of the President's proclamation of

December 26, 1917, and the power vested in him to issue the same.

Continuing, the court, in Idaho Gold Mining Company vs. Winchell, said:

“Counsel for respondent admit that the only question for determination is, was the Union Company the owner of said property for the purpose of creating the lien of respondent? We answer that question in the negative. Respondent in his answer avers that at the time he furnished said wood to the Union Company, it was ‘working and operating said mine as owner and not as lessee of any person or company,’ and that his claim of lien was filed and suit brought to foreclose the same against said Union Company and judgment taken against it. The appellant company was not made a party to said suit nor had it any interest therein. The respondent evidently considered the Union Company the owner of said mining claims, and under the facts of this case his lien must be confined to his interest in said mining claims, which was nothing, at least, after the purchase price had been paid by the appellant. It is well settled that a lien like that under consideration can not be imposed on property by one who has unlawfully ousted the owner. If so, it would be taking his property without his consent, against his will, and without due process of law.”

In Peterson vs. Freier, 121 Pac. 299, at pages 302-303, it was said by the Third District Court of Appeal of California.

“In reply to these contentions, it is first to be remarked that there is absolutely no

showing made by the complaint that the respondents authorized the improvements called for by the contract between Overman and Peterson, or that respondents were in any manner connected with said contract. There is, in other words, no privity of contract disclosed by the complaint to have existed between the respondents and Overman, or that the latter acted as their agent in contracting with Peterson for the making of the improvements. So far as we are advised to the contrary by the complaint, the respondents might have leased the demised premises to Overman with an understanding or ~~and~~ agreement that the latter might or might not improve the buildings on said premises, according to whether the purposes for which he intended to use them might or might not require their alteration and improvement. In such case, no one will deny the right of Overman to make a contract upon his own responsibility with a third party for that purpose, or, under such circumstances, that the lessors could not be held personally liable to the contractor for the value of the labor and materials employed in the construction or making of such improvements."

In *Gulf C. & S. F. Ry. Co. vs. Hamrick*, 231 S. W. 166, the plaintiff sued the railway company and also the Director-General of Railroads for damages resulting from the alleged improper handling of a shipment of cattle. There, as in the present case, the suit was dismissed as against the railway company, and the case proceeded to judgment against the Director-General

of Railroads. In reversing the judgment the Court said:

“As stated, the plaintiff dismissed the railway company from the suit. Notwithstanding this fact, however, the court below rendered judgment fixing a lien against the property of the railway company to secure the payment of the judgment rendered against the Director-General of Railroads. This was error, of course. The railway company not being a party to the suit, the court was without authority to render any sort of judgment against it.”

See also *Wilson vs. Gevurtz, et al*, 163 Pac. 86.

“While a proceeding to foreclose a mechanic’s lien is in its essential nature *in rem*, it is not a proceeding whereby property alone is made defendant in an action to foreclose and the owner must be made a party if his property is to be charged with the claim for which the lien is given.”

*Los Angeles County vs. Winans*, 109 Pac. 640.

## II.

The employees of the United States Railroad Administration were not the agents of the railroad company.

For the purpose of this case a legal presentation of this point is unnecessary, because by the averments of the complaint in the United States District Court and the admissions of the answer no other assumption is permissible. In para-



graph X of the bill of complaint (tr. pages 18-19) it is alleged that upon the appointment and placing in charge of the railroads of the officer known as the Director-General of Railroads, he thereupon assumed supervision and control of said line of railroad of the plaintiff and thereupon and thereby said premises were for all purposes taken wholly from and without the operation, management and control of the plaintiff, and replaced by the complete possession of governmental authority, and that by the establishment of said Railroad Administration and the subsequent orders of the Director-General of Railroads the carrier companies, including the plaintiff herein, were completely separated from the control and management of their systems, and the managing officials and all persons employed on said line of railroad of plaintiff were by the United States Railroad Administration Bulletin No. 4, pages 113, 114 and 313, "required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration," and all such railway employees became and were under the exclusive employment and direction of the United States Railroad Administration, and were in no way controlled by or accountable to their former employers, including plaintiff herein, and the plaintiff here in was

thereby relieved from all liability on account of anything that might be said or done by any person connected with the operation, management or control of said system of railroad at any time during the year 1918, and none of said persons were the agents, servants or employees of this plaintiff; and that by reason of the nature and ownership thereof the foregoing property of this plaintiff can not be taken from the plaintiff and sold except in violation of those provisions of the Constitution of the United States guaranteeing to the plaintiff the equal protection of the laws and providing that no person shall be deprived of his property except by due process of law. These allegations were not traversed or denied, and must, of course, be deemed admitted. These averments were based expressly upon the decision of the United States Supreme Court in *Missouri Pacific Railroad Company vs. Ault*, 256 U. S. 554, where at page 557 the court said:

“First. The company is clearly not answerable in the present action if the ordinary principles of common-law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director-General, through ‘one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to re-

place, for the period provided, the private ownership theretofore existing.' Northern P. R. Co. vs. North Dakota, 250 U. S. 135, 148, 63 L.ed. 897, 902, P. U. R. 1919D, 705, 39 Sup. Ct. Rep. 502. This authority was confirmed by the Federal Control Act of March 21 1918, chap. 25, 40 Stat. at L. 451, and the ensuing Proclamation of March 29, 1918, 40 Stat. at L. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director-General, the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.' U. S. R. R. Adm. Bulletin No. 4, pp. 113, 114, 313. The railway employees were under its direction, and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, Sections 5, 198, et seq. 330 et seq. It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies, as their interest in and control over the systems were completely suspended." \* \* \*

"It is urged that, since section 10, in terms continues the liability of 'carriers while under Federal control' and permits suit against them, it should be construed as subjecting the companies to liability for acts or omissions of Railroad Administration, although they are deprived of all power over the properties and the personnel. And it is said that this construction would not result in hard-

ship upon the companies, since the just compensation provided by the act would include any loss from judgments of this sort. Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power. It should not be made in the absence of compelling language. *United States ex rel. Atty. Gen. vs. Delaware & H. Co.* 213 U. S. 366, 408, 53 L.ed. 836, 848, 29 Sup. Ct. Rep. 527. There is none such here."

Upon the pleadings as they stand and this authority we feel certain that this Court will freely and immediately concede that the Director-General, who had gone into the occupancy and control of the company's property by virtue of the Proclamation of the President and the authority vested in him under the war powers of the Constitution, and without any previous invitation, consent or agreement of the corporation, was not, nor were his employees, the agent of the corporation within the meaning of the lien law of Idaho, or at all, and that therefore an erroneous and false premise is assumed where, in the opinion of this Court, speaking of the Director-General, it is said:

"He was managing it (the railroad) and controlling it *in the interests of the appellee*, and operating it through the appellee's agents, officers, attorneys and employees."

In this connection it might be entirely permissible for us to suggest that which the Court upon



reflection probably knows, namely, that upon the management and operation and jurisdiction over all employees being taken away from the corporations to the extent and in the manner stated by the United States Supreme Court in *Missouri Pacific Railroad Company vs. Ault*, 256 U. S. 554, that the carrier companies thereupon ceased to be represented as corporations by the same counsel that represented the United States Railroad Administration, but that on each road or system independent counsel possessing the right and duty of responding solely to the corporation, were appointed for the purpose of representing the corporation's interests; and without this the provision of sections 1, 2 and 3 of the Federal Control Act (Act of March 21, 1918) relative to annual compensation to be awarded to the carriers for the use of their property, and the adjustment of claims for compensation before the Board of Adjustment, could not have been carried out or the necessary negotiations conducted. But, however this may be, the decision of the United States Supreme Court in the *Ault* case has placed the matter beyond discussion or debate.

### III.

The railroad corporation remained a responsible legal entity against which as sole defendant, the lien, if valid, could be enforced, notwith-



standing the provisions of section 10, Act of Congress, approved March 21, 1918, or any other Federal statute or regulation, and said lien could not otherwise be established consistently with due process of law.

That the corporate entity of the railroad company existed all of the times in question can not be doubted, and is in fact alleged in paragraph 1, of the amended bill of complaint, appearing at page 7 of the transcript of the record, and is expressly admitted at page 66 of the transcript.

On the lien law phase of the case, which is sufficient to dispose of the question, the Idaho Supreme Court in *Idaho Gold Mining Company vs. Winchell*, 59 Pac. 533, 535, placing upon its own statute a construction which is binding upon this court, said:

“The appellant company (owner) was not made a party to said suit nor had it any interest therein. The respondent evidently considered the Union Company the owner of said mining claims, and under the facts of this case a lien must be confined to his interest in said mining claims which was nothing at least, after purchase price had been paid by appellant (the appellant thereupon becoming the owner of the property). It is well settled that a lien like that under consideration can not be imposed on property by one who has unlawfully ousted the

owner. If so, it would be taking the property without his consent, against his will, and without due process of law."

So far as the right of the contractor to pursue his remedy against the corporation is concerned, that such right existed notwithstanding Federal control appears to be clearly established by the decision of the U. S. Supreme Court in Vicksburg, Shreveport & Pac. Ry. Co. vs. Anderson-Tully Co., 256 U. S. 408, where at page 412 the court said:

"Since the shipment for which reparation was allowed moved prior to the taking over of the railroads by the United States government, as against the objection of government control, we think the provision of section 10 of the Federal Railroad Control Act (March 21, 1918, 40 Stat. at L. 451, 456, chap. 25 Compiled Stat. Sections 3115 3-4a, 3315 3-4j, Fed. Stat. Anno. Supp. 1918, pp. 757, 762), is applicable and ample to support the jurisdiction; viz., that 'actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government'."

As we write this brief we are just in receipt of the last pamphlet of Shephard's Citations, which shows that there has been no reversal or modification of the foregoing expression. Frank-

ly, when this opinion is set opposite the opinion of the United States Supreme Court in the Ault case, rendered almost simultaneously, the two decisions can not be completely reconciled, but they are entirely reconcilable on the theory of law that in considering the pronouncement of the court in the interpretation of a statute, or otherwise, regard must be had to the particular subject under consideration at the time of such discussion and decision, and the United States Supreme Court upon express consideration of this statute having clearly decided that section 10 of the Act is no obstacle to a suit to establish corporate liability under the circumstances arising in the Anderson-Tully case from which we have just quoted, it similarly follows that section 10 of the Act constituted no obstacle to the maintenance of this suit against the corporation for the purpose of establishing such lien, if any, as the plaintiff was entitled to in the original suit. In fact, from a mere reading of section 10 of the Act of March 21, 1918, it will be at once observed that it contains no inhibition against suing the carrier company to establish any liability which may exist against it, but that it merely provides that the carriers (as defined by the United States Supreme Court in the Ault case) while under Federal control shall be subject to all laws and liabilities as common car-

rier,<sup>5</sup> and that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," etc. This and the President's proclamation and General Order No. 50 provide for a remedy against that branch of the United States government operating the railroads during the period of "Federal control," but none of these nor any other federal statute, either in express language or inferentially, deprive any party of the right to sue the corporation to establish any liability to which it may be legally subject.

General Order No. 50, contained no prohibition against suing the corporation, even assuming that the Director-General possessed authority to make such a prohibition, but on the contrary has provided for the institution against the Director-General of Railroads of suits of a limited class, viz., "based on contract binding upon <sup>the</sup> Director General of Railroads, claims for death or injury to person, or for loss and damage to property arising since December 31, 1917 and growing out of the possession, use, control or operation of any system of transportation by the Direction-General of Railroads." This limitation was put on the right to sue—"which action, suit or proceeding *but for Federal control* might have been brought against the carrier company." In other words, the intention could not

have been more clearly expressed than it was that where notwithstanding Federal control there was a right of action which could be enforced against the carrier company and that did not fall within the class theretofore defined, then it was not a suit or proceeding which "but for Federal control" might be brought against the carrier company, but was one which notwithstanding such Federal control could nevertheless be brought against the company. Therefore if we were to assume that by the fiat of the Director General a party litigant was or could be deprived of his right to sue or establish a lien against one who was justly indebted to him on account of matters not arising out of Federal control or to declare that a judgment or lien might, notwithstanding constitutional guarantee of due process of law, be established against such defendant by suing one who had no interest in the corporate affairs, still the Director General did not assume to exercise such authority.

We therefore respectfully submit that this Court was in error when in its opinion it said:

"Under the law McGill was forbidden to make the appellee a party. The suit was required to be brought against the Director General only. He, however, represented the rights of the appellee."

Granting, therefore, that the lien, if any, did



not arise out of Federal control or grow out of the possession, use, control or operation of the railroad as defined in Order 50 or Order 50a of the Director General of Railroads—and we freely concede such to be the case—it follows from the language of section 7339, Idaho Compiled Statutes, the decisions of the Idaho Supreme Court construing that statute, and general principles of law and the authorities that we have cited, that before plaintiff could recover it was necessary for him to institute a suit against the owner of the property for the establishment of his lien, and there was no impediment to his so doing, and in that suit establish that the labor and material had been furnished at the instance of the railroad company or its agent, and without this no judgment could be rendered or lien established against the property of the railroad company consistently with due process of law or without denying to the railroad company the equal protection of the laws.

Upon an examination of the case of McPherson County vs. United States Railroad Administration, 203 Pac. 912, which this court cites as authority for the proposition that this cause of action did not arise during Federal control of the railroads, was not caused by that control, nor did the cause of action arise out of such control, it will be observed that that case is express au-

thority for the proposition that the corporation could be sued notwithstanding Federal control for just such a liability as has been asserted by McGill with reference to the depot of the Oregon Short Line Railroad company. In that case the title is somewhat misleading because it is reported as "McPherson County vs. United States Railroad Administration, et al" and judgment affirmed; but the judgment was not affirmed against the United States Railroad Administration, but only as against the corporation, the language of the affirmation being:

"This cause of action arose during Federal control of railroads, but was not caused by that control nor did the cause of action arise out of such control. The obligation that is sought to be enforced arose when the railroad was built, has existed continuously from that time to the present, and no reason has been shown why the judgment was not properly rendered *against the railroad company*. The judgment is affirmed."

"The identity of a railroad corporation was not lost by its property passing under government control under the Federal control Act, and it still could be sued on its legal obligations so that the commencement of an action against it was not notice to the government."

Davis vs. Chrisp, 252 S. W. 606.

"The fact that a railroad company was under the control of the Director General

of Railroads did not deprive the Public Service Commission of jurisdiction over the corporation which owned the road, in a proceeding to abolish a grade crossing."

Erie R. Co. vs. Public Service Commission, 76 Pa. Super. Ct. 170.

"A railroad was competent to interpose objections to the creation of a road district under the statutes of Mississippi, or to the levy of taxes therein, though its road was at the time operated by the government."

Gulf & S. I. R. Co. vs. Duckworth, 280 Fed. 645. Affirming judgment (D. C.) 280 Fed. 733.

In Hines vs. Woodson, 280 Fed. 966, it was held:

"The Director General of Railroads held not liable for the flooding of land alleged to be due to obstruction of a stream by a bridge built by a railroad company many years before he took control of its operation, and of the improper construction of which he was not given notice."

Could it be contended in such a case that judgment against him would bind the owner of the property?

In Bryson vs. Great Northern Ry. Co., 203, Pac. 529, judgment was rendered in the District Court of Montana against the railroad company in an action brought against it on account of the death of a locomotive engineer which resulted

from a collision during the period of Federal control. The Montana Supreme Court said:

“It is conceded by plaintiff’s counsel that the cause must be reversed as to the defendant company, and the only question presented necessary for our decision is whether it is within the jurisdiction of this court to order a substitution of the party defendant, so as to make the judgment entered herein effectual against James C. Davis as agent under the Transportation Act, rather than the defendant railway company, or to grant a new trial permitting the substitution of the party defendant and a retrial of the issues as to the new party defendant. \* \* \*

“We cannot at this juncture of the proceedings say this is a meritorious case, the judgment is warranted, but you have sued and obtained a judgment against a party not legally responsible; therefore the cause is reversed and remanded, with directions to substitute a new party defendant, and proceed to trial de novo as against such new party. Such procedure is unheard of and unjustifiable, and we venture to say that, if the case were one between individual litigants, plaintiff’s learned counsel would not be heard to seriously advance such a proposition.

“Neither are we authorized, nor is it within our jurisdiction, to substitute a new party defendant and affirm the judgment as to such substituted party. The plaintiff deliberately elected to sue the corporation, as the party primarily responsible, and rejected the efforts made by the defendant to have the

Director General of Railroads substituted, and insisted that the defendant corporation alone was the party responsible. The defendant company seasonably asserted and persisted in maintaining its nonliability, since the government was in possession, control, and operation of its railroad at the time of the negligent death of the plaintiff's intestate. Were we to order a substitution of parties defendant at this time, and affirm the judgment as against the new defendant, we feel that our action would be arbitrary and wholly unwarranted."

The principles which we have thus expounded were so fully appreciated and so clearly expressed by the District Court that we quote from Judge Dietrich's opinion as follows:

"We assume that the general conditions out of which the decree in the state court grew are substantially as set forth in the opinion of the Supreme Court. Apparently conceding that a distinction is to be made between a case where the plaintiff in an injunction suit in a federal court is or was a party to a state court suit and one where he is a stranger to such suit, the defendants earnestly contend that the plaintiff here, while not made so in form, was in fact a defendant in the case in the state court. The reasoning is that possession of the plaintiff's railroad system by the Government was in the nature of a receivership, and that the Director General stood in the place of the corporation and was its legal representative. It seems that originally the Oregon Short Line Railroad Company was the defendant



in that case, but for some reason, plaintiff, by amendment, voluntarily dismissed it and substituted in its place the Director General as sole defendant. This it is thought must have been done under a mistaken view of the status of the Director General and of his relation to the corporation owning the system of railroads in his charge, while such system was under the control of the Government. Generally speaking, the Director General was not the personal representative of the railroad company. He did have relation to certain of the corporate property, and in that relation his status was in some respects analagous to that of a lessee in the possession of and operating a railroad system, and in some respects like that of a receiver—but, it should be added, a receiver for only some of the property of a going corporation, not for the winding up of an insolvent corporation. It was never contemplated that the Director General should represent the railroad company in litigation involving its interests, and it is extremely doubtful whether even as a war measure congress would have the power to confer upon him such authority without the consent of the railroad company. The taking of the transportation systems out of the hands of the owning corporations and placing them under the management of the Director General did not affect the general legal status or competency of the owning corporations. Touching such systems, for the time being their rights and duties were qualified, but they may have had other property, and also independent obligations, evidenced by stock, bonds, and contracts, as well as liabilities for torts com-

mitted by them while they were in the possession of the railroad lines. In relation to these matters they were competent to act and to sue and be sued. As lessee in possession, the Government was, under certain statutory provisions, responsible for the acts of its agents and employes substantially in the same manner and to the same extent as a public service corporation would be. In short, laying aside some of the prerogatives of sovereignty, it became a carrier. It was not directly suable, but in its Director General it put forward a representative whom it authorized to be sued in its stead. For such purposes he became the representative, not of the railroad corporation, but of the Government. Judgments against him were collectible from the Government, not from the corporations, for the latter were not legally responsible for claims arising out of the operation of the railroads during this period. *Mo. Pac. Railroad Co. vs. Ault*, 256 U. S. 554. *W. U. Tel. Co. vs. Poston*, Dec. Sup. Ct. U. S. June 6, 1921.

“Little need be added to make it clear that there was no merging of the identity of the railroad company into that of the Director General. The latter and the Government were identical, but the railroad corporation continued to be a distinct, independent entity, competent to transact its own business and to sue and be sued touching controversies to which it was a party in interest. Not only is it true that the Director General was not its legal representative, but, as further appears, he required all of his agents and employes to sever their relations with their former employer, the railroad corporation,

and to become exclusively representatives of the United States Railroad Administration. (Bulletin No. 4, pp. 113, 114, 313.) \* \* \*

“The manifest distinction between controversies growing out of the possession, use, and operation of a railroad system by the Government, in which its Director General and not the railroad is interested, and cases involving property rights and the personal obligations of the corporation in which it alone and not the Director General or the Government is interested, readily suggests a dilemma in which the plaintiff in the state court is necessarily placed. If his claim grew out of the possession and operation of the Government, and if, therefore, the Director General, as authorized representative of the Government, was the proper party defendant, then under the provisions of the Transportation Act of February 28, 1920, (41 Stat. 462), no execution or process can lawfully be issued against the property of the railroad company. See also Sec. 10, 40 Stat. 456. To avoid this express prohibition claimant now denies that the cause of action grew out of Government operation and control. But in that view the claim sued upon was of interest not to the Government or its representatives but only to the Oregon Short Line Railroad Company, and it was the one indispensable party defendant to the suit in the state court. It follows that in either view the execution process is void, in the one alternative because the federal statute expressly forbids, and in the other because the judgment is wholly void owing to the absence of an indispensable party. \* \* \*

“In another aspect: When the repair out of which McGill’s claim arose was made, the station building was in the possession and use of the Director General. If (without so deciding) for present purposes we hold that upon the theory of constructive agency under the pertinent lien laws of the state, the Director General and his employes could subject the station building to such a lien, it would still remain true that in proceedings to foreclose such claim of lien the corporation, because of its conceded ownership, would be an indispensable party. There are many contingencies in which a valid claim of lien may arise and attach to property without direct action on the part of the owner, but if such a claim is based upon acts or agreements of contractors or of other agents, either actual or constructive, still the owner and not such agent or agents is to be made defendant in a suit to foreclose the lien, and no valid decree can be entered without its presence. So here, if we assume the validity of McGill’s claim of lien—a matter upon which we intimate no opinion—and if, as he now contends, it did not grow out of Government control and operation, and was to be asserted against the Government or its property, but exclusively against the Oregon Short Line Railroad company and its property, the latter was an indispensable party to a valid decree. In view of the Director General’s possession and use of the property, his interest may have been such as to suggest the propriety of joining him as a party, but the railroad corporation was the principal party in interest and its presence was essential to



the exercise of jurisdiction to enter a decree of foreclosure. This position is now virtually conceded by the claimant, McGill, but, as already explained, he relies upon the theory that the Director General as defendant is to be regarded as the representative not of the Government, but of the corporation—a view which, for the reasons heretofore given, we have been unable to accept.”

If, as we believe we have clearly demonstrated, it was essential to the establishment of the lien that the labor and material should have been furnished at the instance of the owner or his agent and thereafter a suit instituted against the owner in order to reduce the lien to judgment, but that, on the admitted facts as they appear in the pleadings and the law as announced by the United States Supreme Court, the labor and material were not furnished at the instance of the owner or his agent, and the owner was not made a party defendant, and according to the laws of the forum and principles of constitutional law generally such lien could not be reduced to judgment except in an action wherein the owner was made a party defendant and jurisdiction acquired over him either by process or his voluntary appearance, and jurisdiction was not thus acquired, then, we believe it must be agreed that the judgment of the lower court was correct and should be affirmed.



Respectfully submitted,  
GEORGE H. SMITH,  
H. B. THOMPSON,  
JOHN O. MORAN,  
Attorneys for Petitioner.

UNITED STATES OF AMERICA, }  
STATE OF IDAHO, } ss.  
County of Bannock. }

We, the undersigned, attorneys for Oregon Short Line Railroad Company, appellee and petitioner herein, hereby certify that we have carefully examined the opinion of the Court in the above cause and have prepared the foregoing petition for rehearing herein, and that we are of the opinion that the grounds urged in said petition for rehearing are well founded, and that said petition is not interposed for delay.

.....*Geo H Smith*.....  
.....*H B Thompson*.....  
.....*John O Moran*.....  
Attorneys for Petitioner.

8

**United States**

**Circuit Court of Appeals**

**For the Ninth Circuit.**

---

In the Matter of PATTERSON-MacDONALD SHIP-  
BUILDING COMPANY, a Corporation, Bankrupt.

JOHN L. McLEAN, as Trustee in Bankruptcy of PAT-  
TERSON-MacDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt,

Petitioner,

vs.

COMMONWEALTH OF AUSTRALIA,

Respondent.

---

**Petition for Revision**

Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter  
of Law an Order of the United States  
District Court for the Western  
District of Washington,  
Northern Division.

---

FILED

MAY 1 - 1900

WASH. D. C.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

In the Matter of PATTERSON-MacDONALD SHIP-  
BUILDING COMPANY, a Corporation, Bankrupt.

JOHN L. McLEAN, as Trustee in Bankruptcy of PAT-  
TERSON-MacDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt,  
Petitioner,

vs.

COMMONWEALTH OF AUSTRALIA,  
Respondent.

---

**Petition for Revision**

**Under Section 24b of the Bankruptcy Act of Congress,**  
**Approved July 1, 1898, to Revise, in Matter**  
**of Law an Order of the United States**  
**District Court for the Western**  
**District of Washington,**  
**Northern Division.**

---





United States Circuit Court of Appeals for the  
Ninth Circuit.

No. —.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

JOHN L. McLEAN, as Trustee in Bankruptcy of  
PATTERSON-MacDONALD SHIPBUILD-  
ING COMPANY, a Corporation, Bankrupt,  
Petitioner,

vs.

COMMONWEALTH OF AUSTRALIA,  
Respondent.

**Notice of Filing Petition for Review.**

TO CORWIN S. SHANK, Attorney for the Com-  
monwealth of Australia, Respondent Above  
Named:

YOU ARE HEREBY NOTIFIED that we will  
forthwith, as soon as practicable, in due course  
of mail, file in the clerk's office of the United States  
Circuit Court of Appeals for the Ninth Circuit, in  
the City of San Francisco, a petition for review  
in the above-entitled cause, a copy of which peti-  
tion is hereto attached as a part of this notice,  
and will then ask to have the case docketed and  
the necessary order made therein to have such  
case set down for hearing.

IRA BRONSON,  
J. S. ROBINSON,  
H. B. JONES,  
Attorneys for Petitioner.

I hereby accept service of the above notice this  
17th day of April, 1923.

---

Attorney for the Commonwealth of Australia, Re-  
spondent Above Named.

Copy hereof received this Apr. 17, 1923.

SHANK, BELT & FAIRBROOK.

---

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. —.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

JOHN L. McLEAN, as Trustee in Bankruptcy of  
PATTERSON-MacDONALD SHIPBUILD-  
ING COMPANY, a Corporation, Bankrupt,  
Petitioner,

vs.

COMMONWEALTH OF AUSTRALIA,

Respondent.

**Petition for Review of John L. McLean, Trustee.**  
To the Honorable Judges of the United States Cir-  
cuit Court of Appeals for the Ninth Circuit:

Comes now John L. McLean, trustee in bank-  
ruptcy of Patterson-MacDonald Shipbuilding Com-  
pany, a corporation, bankrupt, and respectfully  
shows unto the Court as follows:

## I.

That upon March 19th, 1920, an order was duly entered in the United States District Court for the Western District of Washington, Northern Division, adjudging Patterson-MacDonald Shipbuilding Company, a corporation, to be a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, said order being based upon its voluntary petition therefor, and upon the said day, the matter of said bankruptcy was referred generally to the Honorable Cicero R. Hawkins, referee in bankruptcy, and thereafter on April 2d, 1920, at the first meeting of creditors of said bankrupt duly called and held before the said referee, said petitioner was duly elected trustee of the estate of said bankrupt, and thereafter duly qualified as such, and ever since has been and now is the duly authorized and acting trustee in bankruptcy therefor.

## II.

That on the 31st day of July, 1920, Mark Sheldon, as Commissioner for the Commonwealth of Australia, and acting for and on behalf of the respondent, presented and filed with the referee for allowance, proof of secured claim of the respondent against the bankrupt in the sum of \$831,972.09, subject to certain unliquidated setoffs, the consideration of said debt being stated as follows, to wit:

“Balance due the said Mark Sheldon by reason of various breaches by the said Patter-

son-MacDonald Shipbuilding Company of a certain contract dated December 18th, 1918," that said claim was thereafter by amendment increased to the sum of \$1,231,972.09; that a true copy of said claim is set forth on page six of the transcript of record on appeal in cause No. 3970 of this court, to which transcript the petitioner will hereafter refer, and respectfully requests the Court to consider, in support of the allegations of this petition.

### III.

That thereafter, during the course of the proceedings herein referred to, and on or about the 31st day of January, 1922, notice was given on behalf of the Commonwealth of Australia to the effect that it was and is the real party in interest in these proceedings (Tr., pp. 56, 57), and accordingly the petitioner hereinafter refers to the Commonwealth of Australia as the respondent herein.

### IV.

That petitioner filed objections to the said claim of the Australian Government on several grounds (see Tr., pp. 42, 43); thereupon the respondent applied to Honorable Jeremiah Neterer, United States District Judge for the Western District of Washington, Northern Division, for an order directing the manner of liquidating said claim (Tr., pp. 4, 5). That thereupon the District Judge, with the consent of the parties, entered an order designating and appointing Hon. C. R. Hawkins, referee in bankruptcy before whom the bankruptcy proceedings



were and are pending, as a special master to take evidence and make findings upon the questions arising out of respondent's claim and the petitioner's objections thereto, and submit his findings and conclusions to the District Court. (Tr., pp. 5, 6.)

#### V.

That in the proceedings before the special master, this petitioner duly filed an answer denying any indebtedness on the part of the bankrupt to the respondent, and for an affirmative answer and defense and counterclaim and cross-complaint against said respondent, set up that the contract upon which respondent's claim was predicated had in fact been breached by the respondent, and that petitioner was entitled to credit and recovery from the respondent for and on account of various items, exceeding all just claims and credits allowable to respondents by the sum of \$1,049,882.20, and asking judgment against said respondent for said sum. (Tr., pp. 44-52.)

#### VI.

That to said answer and counterclaim and cross-complaint, the respondent filed a reply on the merits, denying any indebtedness to petitioner, and praying for a determination of said matter by the master in chancery, and that no objection whatsoever was made therein to the jurisdiction of said master to entertain the claim of this petitioner in said proceeding. (Tr., pp. 53 to 56.)



## VII.

That thereafter, during the course of the hearing before the special master, the petitioner amended his counterclaim and cross-complaint to show an indebtedness due from respondent of \$1,125,830.71, for which amount he prayed judgment against the respondent, and to such amended counterclaim and cross-complaint the respondent orally stated that its previous reply would stand. (Tr., pp. 47-49, 214.)

## VIII.

That the issues between the parties as shown by their pleadings above referred to, were submitted by them to the special master at various sessions of court extending from the 20th day of October, 1920, to the 4th day of October, 1921, and evidence was introduced by each party in support of his contention without any objection whatsoever, save and except that on October 4th, 1921, at the commencement of petitioner's case, the attorney for respondent objected to the introduction of any evidence on behalf of the trustee in opposition to the liquidation of respondent's claim, and any attempt to prove an offset, until the trustee should specifically waive any overplus which might be found to exist in the final proof and the testimony between the amount which the Court should find due the Australian Government and the amount which the Court should find as a proper offset. (Tr., pp. 214, 215); that the special master nevertheless proceeded to hear all of the testimony offered

by either party upon the merits of the controversy, and thereafter rendered to the District Court a report finding that the petitioner was not indebted to respondent in any sum whatsoever, but that on the contrary, there was a balance due in favor of the petitioner from the respondent amounting to \$312,602.48. (Tr., pp. 57-70.)

IX.

That upon the filing of the report of the special master, exceptions thereto were taken by both parties, and this petitioner duly excepted thereto, for failure of the special master to recommend the entry of a judgment against respondent in favor of petitioner in the amount found to be due. (Tr., pp. 101, 102.)

X.

That after hearing the arguments of the respective parties, upon the report of said special master, Judge Neterer, by written opinion filed in the District Court of the United States for the Western District of Washington, Northern Division, on the 21st day of September, 1922, approved and confirmed said report, but without making any direction as to the balance found to be due from respondent to the petitioner (Tr., pp. 105-112); that thereafter, by proceedings in the nature of a rehearing, this question was submitted to Judge Neterer for his decision, the petitioner asking for a judgment against the Australian Government, or, in any event, an order in the nature of a turnover order, or an adjudication of indebtedness in its favor for the amount found to be due; that after

argument upon this question, Judge Neterer rendered a written decision filed in his court on the 18th day of October, 1922, holding that he had no jurisdiction in such proceeding to adjudicate in any way upon the amount found to be due from the respondent to this petitioner (Tr., pp. 115-118), and thereafter, on the 20th day of October, 1922, signed a decree in such proceeding, confirming the report of the master, and disallowing the claim of the respondent, to which decree petitioner duly excepted for failure and refusal of the Court to enter judgment and order directing respondent to pay to petitioner the said sum of \$312,602.48, which exception was duly noted and allowed. (Tr., pp. 112 to 114.)

## XI.

That on the 26th day of October, 1922, an appeal was perfected by the respondent from the decree and judgment, disallowing its claim, which appeal is now pending in this court as cause No. 3970. (Tr., pp. 159, 160.)

## XII.

That on the 23d day of October, 1922, this petitioner filed his memorandum of costs to be taxes against respondent upon confirmation of the report of the special master, which matter came on for hearing before the District Court on the 1st day of November, 1922; that upon consideration thereof, the district judge held that he was without jurisdiction to make any order respecting the taxation of costs, on account of an appeal having been perfected to the Circuit Court of Appeals from such

decree by this respondent, and he did thereupon, on the 13th day of November, 1922, enter an order denying and refusing petitioner's application to tax costs against the respondent in any sum whatsoever, to which ruling and order petitioner duly excepted, and which exception was noted and allowed. (Tr., pp. 122, 125.)

### XIII.

Your petitioner further shows that he is aggrieved by the decree and order of said district court and injured thereby, and that the errors complained of consist:

First: In said Court failing and refusing to enter a judgment in favor of the petitioner and against the respondent in the sum of \$312,602.48, together with interest thereon at legal rate from the date of bankruptcy herein, to wit: March 19th, 1920.

Second: In said Court failing and refusing to make an order herein, demanding and directing the respondent herein to turn over to this petitioner the sum of \$312,602.48, together with interest.

Third: In said Court failing and refusing to make an affirmative finding and recital in its judgment, of indebtedness due from respondent to petitioner in said sum of \$312,602.48, together with interest.

Fourth: In said Court holding that it was without jurisdiction to tax costs in favor of petitioner and against respondent.



Fifth: In said Court failing and refusing to tax against the respondent and in favor of the petitioner the items of costs set forth in petitioner's memorandum.

WHEREFORE, your petitioner prays that the orders, rulings and decrees of the District Court above referred to, be reviewed and revised in matter of law, and that petitioner be awarded judgment against respondent for said sum of \$312,602.48, and interest, or if not granted judgment, that a turn-over order be entered, commanding and directing respondent to pay to petitioner forthwith said sum of \$312,602.48, and interest, or that in the event neither a judgment nor a turn-over order be entered, that the respondent be found and decreed to be indebted to petitioner in the said sum of \$312,602.48, and interest; and further that petitioner be granted judgment against respondent for its costs and disbursements, according to its memorandum thereof, as filed with the clerk of the District Court.

JOHN L. McLEAN,  
Trustee, Petitioner.

IRA BRONSON,  
J. S. ROBINSON,  
H. B. JONES,

Attorneys for Petitioner.

State of Washington,  
County of King,—ss.

J. L. McLean, being first duly sworn, on oath deposes and says: that he is the trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a



corporation, bankrupt, and the petitioner above named; that he has read said petition, knows the contents thereof, and believes the same to be true.

JOHN L. McLEAN.

Subscribed and sworn to before me this 17th day of April, 1923.

[Seal]

W. L. GRILL.

Notary Public in and for the State of Washington,  
Residing at Seattle.

---

[Endorsed]: No. 4012. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Petitioner, vs. Commonwealth of Australia, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Northern Division.

Filed April 20, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



9

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

RICHARD L. HALSEY, as Inspector in Charge  
of Immigration at the Port of Honolulu,  
Appellant,

vs.

HO AH KEAU, Otherwise Known as HO SHEE,  
Appellee.

---

Transcript of Record.

---

Upon Appeal from the United States District Court  
for the District of and Territory, of Hawaii.

---

FILED  
MAY 21 1923  
F. D. WOODSTON,  
CLERK



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

RICHARD L. HALSEY, as Inspector in Charge  
of Immigration at the Port of Honolulu,  
Appellant,

**vs.**

HO AH KEAU, Otherwise Known as HO SHEE,  
Appellee.

---

**Transcript of Record.**

---

Upon Appeal from the United States District Court  
for the District of and Territory, of Hawaii.

---





# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Acknowledgment of Receipt of Papers on Appeal .....	139
Affidavit of J. Lightfoot in Support of Motion for Leave to Amend.....	74
Amended Return of Richard L. Halsey, Respondent, to Writ of Habeas Corpus.....	117
Assignment of Errors.....	133
Bond .....	78
Certificate of Clerk U. S. District Court to Transcript of Record.....	143
Citation on Appeal.....	138
Decision—Order Sustaining Demurrer to Return to Order to Show Cause.....	129
Demurrer of Petitioner to Amended Return to Richard L. Halsey, Respondent, to Writ of Habeas Corpus.....	121
Demurrer of Petitioner to Return of Richard L. Halsey, Respondent, to Order to Show Cause .....	71
Demurrer of Petitioner to Return of Richard L. Halsey to Writ of Habeas Corpus.....	98

## Index.

Page

## EXHIBITS:

Exhibit "A" to Motion for Leave to File Amended Return—Affidavit of William T. Carden .....	114
Exhibit "A" Attached to Return of Richard L. Halsey to Order to Show Cause—Finding of Secretary of Labor upon Appeal, In re Ho Shee, <i>alias</i> Ah Keau.....	58
Exhibit "A" Attached to Return of Richard L. Halsey to Writ of Habeas Corpus—Finding of Secretary of Labor upon Appeal, In re Ho Shee, <i>alias</i> Ah Keau.....	84
Exhibit "B" Attached to Return of Richard L. Halsey to Order to Show Cause—Letter Dated February 14, 1922, F. H. Larned to Inspector-in-charge, Immigration Service.	69
Exhibit "B" Attached to Return of Richard L. Halsey to Writ of Habeas Corpus—Memorandum for the Assistant Secretary, In re Ho Shee, <i>alias</i> Ah Leai.....	87
Exhibit "C" Attached to Return of Richard L. Halsey to Order to Show Cause—Letter Dated February 11, 1922, F. H. Larned to Inspector-in-charge, Immigration Service.	70
Exhibit "C" Attached to Return of Richard L. Halsey to Writ of Habeas Corpus—Correction of Finding and Order of Secretary of Labor, Dated March 6, 1922, In re Ho Shee	95
Exhibit "D" Attached to Return of Richard L. Halsey to Writ of Habeas Corpus—Memorandum for Assistant Secretary In re Ho Shee .....	95

Index.	Page
Judgment .....	123
Minutes of Court—March 6, 1922—Order Over- ruling Demurrer to Return of Respondent to Order to Show Cause Fixing Bond and Directing Issuance of Writ of Habeas Cor- pus .....	128
Minutes of Court—August 10, 1922—Decision —Order Sustaining Demurrer to Return to Order to Show Cause.....	129
Minutes of Court—October 4, 1922—Order Sus- taining Demurrer to Amended Return Herein, Making Writ Issues Herein Per- manent and Stipulation Allowing Respond- ent Ninety Days to Perfect Appeal.....	130
Motion for Leave to Amend Petition for Writ of Habeas Corpus.....	73
Motion for Leave to File Amended Return....	112
Names and Addresses of Attorneys of Record..	1
Opinion .....	99
Order Allowing Appeal.....	128
Order Extending Time to and Including April .24, 1923, to Transmit Record on Appeal...	4
Order Overruling Demurrer <i>Pro Forma</i> and Admitting Petitioner to Bail Pending Final Determination of Cause.....	76
Order Overruling Demurrer to Return of Re- spondent to Order to Show Cause, Fixing Bond and Directing Issuance of Writ of Habeas Corpus.....	128

Index.	Page
Order Sustaining Demurrer to Amended Return Herein, Making Writ Issues Herein Permanent and Stipulation Allowing Respondent Ninety Days to Perfect Appeal..	130
Order to Show Cause.....	13
Petition for an Allowance of Appeal.....	126
Petition for Writ of Habeas Corpus.....	6
Praecipe for Transcript of Record.....	131
Proceedings Had Before Board of Special Inquiry .....	14
Return of Richard L. Halsey to Order to Show Cause .....	54
Return of Richard L. Halsey to Writ of Habeas Corpus.....	81
Statement of Clerk.....	1
Stipulation Extending Time to and Including February 5, 1923, for Perfecting Appeal..	124
Stipulation Extending Time to and Including February 25, 1923, for Perfecting Appeal.	125
Stipulation Re Filing Record of Proceedings Before Board of Special Inquiry and Secretary of Labor of United States.....	116
Stipulation Re Printing of Duplicate Portions of Record .....	142
Stipulation Re Translation of Chinese Characters .....	140
Stipulation Under Rule 23.....	471



**Names and Addresses of Attorneys of Record.**

For the Petitioner, HO AH KEAU, Otherwise  
Known as HO SHEE:

HARRY IRWIN, Esq., Hilo, Hawaii.

For the Respondent, RICHARD L. HALSEY, Esq.,  
United States Immigration Inspector-in-  
Charge at the Port of Honolulu:

WILLIAM T. CARDEN, Esq., United  
States District Attorney, Federal  
Building, Honolulu, Hawaii. [1\*]

---

In the District Court of the United States in and  
for the District and Territory of Hawaii.

No. 174.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE, for  
a Writ of Habeas Corpus.

**Statement of Clerk.**

**TIME OF COMMENCEMENT OF SUIT.**

March 1, 1922. Verified petition for writ of  
habeas corpus and order to show cause.

**NAMES OF ORIGINAL PARTIES.**

HO AH KEAU, otherwise known as HO SHEE,  
Petitioner.

RICHARD L. HALSEY, Esq., United States  
Inspector of Immigration-in-charge at the Port  
of Honolulu, Respondent.

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

## DATE OF FILING OF THE PLEADINGS.

March 1, 1922. Petition.

March 4, 1922. Return of respondent to order to show cause.

April 7, 1922. Return of respondent to writ of habeas corpus.

October 4, 1922. Amended return of respondent to writ of habeas corpus.

## SERVICE OF PROCESS.

March 1, 1922. Acknowledgment of copy of petition and order to show cause by S. C. Huber, U. S. Attorney by N. D. Godbold, Asst. U. S. Atty.

## HEARINGS.

March 6, 1922. Demurrer to return, order fixing bond and issuance of writ and motion to amend petition.

August 10, 1922. Decision on demurrer to return.

October 4, 1922. Decision on demurrer to amended return and notice of appeal. [2]

## DECISIONS.

August 10, 1922. Decision on demurrer to return.

October 4, 1922. Decision on demurrer to amended return, applicant discharged.

October 4, 1922. Judgment filed and entered. (Poindexter, J.)

## PETITION FOR APPEAL.

February 24, 1923. Petition for appeal and order allowing same filed.

United States of America,  
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit, the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the petition and order to show cause and the time when the judgment herein was rendered and the Judge rendering the same, in the matter of the application of Ho Ah Keau, otherwise known as Ho Shee for a writ of habeas corpus, number 174, in the United States District Court of the Territory of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of April, A. D. 1923.

[Seal]

WM. L. ROSA,  
Clerk, United States District Court, Territory of  
Hawaii. [3]

---

In the United States District Court in and for the District and Territory of Hawaii. No. ——. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Order Extending Time to Transmit Record on Appeal. March 12, 1923, at 3 o'clock and 30 minutes P. M. Wm. L. Rosa, Clerk.

By ———, Deputy Clerk. William T. Carden, United States District Attorney for the Territory of Hawaii, Fred Patterson, Assistant United States Attorney, Eaton H. Magoon, Assistant United States Attorney, Attorneys for Respondent, Richard L. Halsey. [4]

In the United States District Court in and for  
the District and Territory of Hawaii.

No. —.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Order Extending Time to and Including April 24,  
1923, to Transmit Record on Appeal.**

Now on the 12th day of March, 1923, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of record on appeal in the above-entitled matter within the time limited therefor by the Citation on Appeal heretofore issued in this cause, and the respective parties on appeal by their counsel agreeing thereto, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record in this matter, together with the assignment of errors and all papers required to be forwarded herein to the clerk of the Ninth

Circuit Court of Appeals, be, and the same is hereby extended to April 24th, 1923.

Dated at Honolulu, T. H., March 12th, A. D. 1923.

J. B. POINDEXTER,  
Judge of the United States District Court for the  
Territory of Hawaii.

RICHARD L. HALSEY,  
United States Inspector-in-Charge at the Port of  
Honolulu.

By WILLIAM T. CARDEN,  
United States District Attorney,  
His Attorney.

The parties herein consent to the foregoing order.

HO AH KEAU.  
By HARRY IRWIN,  
His Attorney. [5]

---

In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Petition for Writ of Habeas Corpus and Order to Show Cause. Filed March 1, 1922. (Sgd.) Wm. L. Rosa, Clerk.

Acknowledgment of a copy of this petition and of the order to show cause is hereby made.



This the 1st day of March, 1922.

S. C. HUBER,

U. S. Attorney.

By (Sgd.) N. D. GODBOLD,

Asst. U. S. Atty.

HARRY IRWIN,

J. LIGHTFOOT,

Attorneys for Petitioner. [6]

In the District Court of the United States in and  
for the District and Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Petition for Writ of Habeas Corpus.**

To the Honorable J. B. POINDEXTER, Judge of  
the United States District Court, in and for  
the District and Territory of Hawaii.

The petition of Ho Ah Keau, otherwise known  
as Ho Shee, appearing herein by her lawful hus-  
band, L. Ah Leong, for a writ of habeas corpus,  
respectfully shows unto your Honor as follows:

I.

That heretofore and on, to wit, the 25th day of  
May, A. D. 1891, the said Ho Ah Keau, otherwise  
known as Ho Shee, was lawfully married to L. Ah  
Leong, by the Reverend C. M. Hyde, a minister of  
the gospel, duly authorized to solemnize marriage  
ceremonies under the laws of the Hawaiian  
Islands, they, the said Ho Ah Keau, otherwise  
known as Ho Shee, and the said L. Ah Leong,

having previously obtained, in the manner provided by law, a marriage license.

II.

That at the time of the marriage as aforesaid, the said L. Ah Leong was a citizen of the Hawaiian Islands, and is now a citizen of the United States of America, residing [7] and carrying on the business of a merchant in Honolulu, City and County of Honolulu, Territory of Hawaii.

III.

That on or about the 13th day of January, 1910, the said Ho Ah Keau, otherwise known as Ho Shee, departed from the port of Honolulu on board the steamship "Korea," bound for China.

IV.

That said Ho Ah Keau, otherwise known as Ho Shee, returned from China to the port of Honolulu on board the steamship "Siberia Maru," on the 7th day of December, A. D. 1921, and was held for examination before a Board of Special Inquiry at said port of Honolulu.

V.

At the conclusion of the said hearing before said Board of Special Inquiry Mr. Louis N. Land, one of the members of said Board of Special Inquiry, moved that the applicant Ho Ah Keau, otherwise known as Ho Shee, be admitted as the wife of a naturalized citizen, which motion was seconded by Mr. Edwin Farmer, a member of said Board of Special Inquiry.

VI.

Thereupon, Mrs. Martha Maier, a member of

said Board of Special Inquiry, voted against the said motion and noted an appeal from the decision of the majority of said Board of Special Inquiry.

#### VII.

That a copy of the proceedings had before said Board of Special Inquiry is hereby attached, made a part hereof, and to which reference is hereby made. [8]

#### VIII.

That said Ho Ah Keau, otherwise known as Ho Shee, filed in the United States Department of Labor, Immigration Service, at the port of Honolulu, a brief in the matter of said appeal.

#### IX.

That on the 14th day of February, A. D. 1922, the Commissioner General of Immigration, by Mr. F. H. Larned, Special Assistant, notified Richard L. Halsey, Esq., United States Immigration Inspector-in-Charge at the port of Honolulu, that the said appeal, so noted by Mrs. Martha Maier, member of the board of special inquiry as aforesaid, was sustained.

#### X.

That one of the attorneys for the said L. Ah Leong, Mr. J. Lightfoot, has been permitted to examine the record of the case of said Ho Ah Keau, otherwise known as Ho Shee, and the said attorney has informed him, the said L. Ah Leong, that it is impossible to state from an examination of said record whether the said appeal was sustained on the ground that Ho Ah Keau, otherwise known as Ho Shee, believed in the practice of

polygamy or whether the Commissioner General of Immigration believed that the said Ho Ah Keau, otherwise known as Ho Shee, had not been lawfully married to the said L. Ah Leong, and therefore, the said petitioner, by her said husband is informed and believes and upon such information alleges and avers that it cannot be determined from the record in said case whether the said Ho Ah Keau, otherwise known as Ho Shee, is ordered excluded from the United States because she is not the legal wife of the said L. Ah Leong, or whether such exclusion is because the said Ho Ah Keau, otherwise known as Ho Shee believes [9] in the practice of polygamy.

#### XI.

That the said Ho Ah Keau, otherwise known as Ho Shee, is now detained, confined, imprisoned and deprived of her liberty, by Richard L. Halsey, Esq., United States Inspector-in-Charge at the port of Honolulu, she, the said Ho Ah Keau, otherwise known as Ho Shee, being imprisoned as aforesaid by the said Richard L. Halsey, Esq., at the United States Immigration Station at the port of Honolulu.

#### XII.

That the reason, cause or pretext for the imprisonment of said Ho Ah Keau, otherwise known as Ho Shee, as aforesaid, is that the appeal so noted by the said Mrs. Martha Maier, member of the board of special inquiry as aforesaid, has been sustained by the proper officers of the United States Department of Labor, Immigration Service.



## XIII.

That your petitioner is informed and believes that it is the intention of the said Richard L. Halsey, Esq., to deport your petitioner from the port of Honolulu to the Republic of China, by a steamer leaving the said port of Honolulu at an early date, unless the said petitioner shall receive from your Honor the relief herein prayed for.

## XIV.

That the said confinement, restraint and imprisonment is illegal and contrary to the laws of the United States and the laws of the Territory of Hawaii, for the following reasons:

1. That your petitioner, the said Ho Ah Keau, otherwise known as Ho Shee, is an American citizen by reason of her [10] lawful marriage to the said L. Ah Leong as aforesaid;

2. The said petitioner is the lawful wife of a citizen of the United States of America and as such is entitled to enter the United States of America;

3. That the said Ho Ah Keau, otherwise known as Ho Shee, does not believe in nor has she practiced polygamy, and there was no evidence adduced before said board of special inquiry showing that she, the said Ho Ah Keau, otherwise known as Ho Shee, did believe in the practice of polygamy or had herself practiced polygamy;

4. That the hearing had before the said board of special inquiry was not a fair, just and impartial hearing, but was unfair and unjust and constituted a mere pretense of a hearing.



WHEREFORE, to be relieved of said unlawful detention, restraint, imprisonment and deprivation of liberty, your petitioner prays that a writ of habeas corpus issued out of this Honorable court, commanding the said Richard L. Halsey, Esq., United States Immigration Inspector-in-Charge at the port of Honolulu, to produce the body of your petitioner and the said Ho Ah Keau, otherwise known as Ho Shee, before this Honorable Court, at a time to be mentioned in said writ, and then and there do and receive what shall be adjudged by the Court in the premises, and that upon a hearing in this Honorable court on the matters and things hereinabove set forth, the said writ of habeas corpus be made perpetual and your petitioner, Ho Ah Keau, otherwise known as Ho Shee, be relieved from said unlawful detention, confinement, imprisonment and deprivation of liberty, and for such other and further relief as this Honorable Court deem meet in the premises.

Dated, Honolulu, T. H., this 1st day of March,  
A. D. 1922.

HO AH KEAU,  
Otherwise Known as HO SHEE,  
Petitioner,  
By (Sgd.) L. AH LEONG,  
Her Lawful Husband. [11]

AMENDMENTS TO THE PETITION FOR WRIT OF HABEAS CORPUS FILED HEREIN, ALLOWED BY THE HONORABLE J. B. POINDEXTER, JUDGE OF THE ABOVE-ENTITLED COURT, AND ORDERED BY HIM TO BE ATTACHED BY THE CLERK TO THE SAID PETITION FOR WRIT OF HABEAS CORPUS.

“5. That the proceedings had before the Department of Labor and Bureau of Immigration, on the appeal so taken from the Board of Special Inquiry, as aforesaid, were prejudiced and unfair and constituted a mere semblance of a passing upon the matters and things raised by said appeal.

“6. That the Chairman of the Board of Review, to whom said appeal was submitted, recommended that the appeal be denied, showing that he, the said Chairman of the Board of Review had failed to consider the said appeal on its merits.

“7. That the Secretary of Labor, in ordering that the said appeal be sustained, if he did so order, was acting upon evidence, or supposed evidence, not adduced before the Board of Special Inquiry, in contravention of Section 17 of an Act Regulating Immigration of Aliens to, and Residence of Aliens in, the United States, approved February 5th, 1917.” [12]

United States of America,  
Territory of Hawaii,—ss.

On this 1st day of March, A. D. 1922, personally appeared before me L. Ah Leong, who being first

duly sworn, on oath deposes and says, that he is the lawful husband of Ho Ah Keau, otherwise known as Ho Shee, and that he has commenced these proceedings in habeas corpus for and on behalf of said Ho Ah Keau, otherwise known as Ho Shee, petitioner herein, and at her request; that he has read the foregoing petition for writ of habeas corpus and knows the contents thereof, and that the same is true, except as to the matters therein alleged on information and belief, and as to these, he believes them true.

(Sgd.) L. AH LEONG.

Subscribed and sworn to before me this 1st day of March, A. D. 1922.

[Seal] (Sgd.) THERESA CLARK,  
Notary Public, First Judicial Circuit, Territory of Hawaii.

(Sgd.) HARRY IRWIN,  
J. LIGHTFOOT,  
Attorneys for Petitioner. [13]

In the District Court of the United States in and for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU, Otherwise Known as HO SHEE, for a Writ of Habeas Corpus.

**Order to Show Cause.**

To RICHARD L. HALSEY, Esq., United States Immigration Inspector-in-Charge at the Port of Honolulu:

Upon reading the petition for a writ of habeas

corpus filed in the above-entitled court on this 1st day of March, A. D. 1922, and good cause appearing therefor,

You are hereby ordered to appear before me in the courtroom of the District Court of the United States, in and for the District and Territory of Hawaii, on Friday, the 3d day of March, A. D. 1922, at the hour of 2 in the afternoon of said day, then and there to show cause, if any you have, why the writ of habeas corpus should not issue as prayed for in said petition.

Done at Chambers, this 1st day of March, A. D. 1922.

(Sgd.) J. B. POINDEXTER,  
Judge, United States District Court. [14]

---

**Proceedings Had Before Board of Special Inquiry.**

U. S. DEPARTMENT OF LABOR,  
IMMIGRATION SERVICE.

File No. 4391/1—4382/212.

Port of Honolulu, T. H.

**RECORD OF BOARD OF SPECIAL INQUIRY.**

In the Matter of the Application of HO AH  
KEAU, Alleged Wife of a Citizen—LAU  
CHONG—Hawaiian Born 1-1-22.

“Siberia Maru”—12/7/21.

For Admission to the United States.

Convened—December 9, 1921.

Chairman—EDWIN FARMER.

Member—LOUIS N. LAND.

Member—MARTHA MAIER.

Interpreter—HEE SOU HOY.

Typist—MARTHA MAIER.

Held for Special Inquiry by Inspector—RICHARD  
L. HALSEY.

APPLICANT, sworn by Chairman, testifies:

Q. Have you secured an attorney to represent you in the hearing that is about to commence?

A. I do not know.

Q. Do you expect to present witnesses to establish your right to admission to the United States?

A. Yes—my husband will get the witnesses.

Q. During the course of this hearing it may be necessary for some officer of this service to take testimony outside of this office, or go to some other governmental office or place and search records. Are you willing that this should be done and have the testimony taken in this manner, and also have the report of the search of the records considered by this Board of Special Inquiry?

A. Yes.

Q. Do you desire a friend or relative present at this hearing? A. No.

Q. What is your name and age?

A. Ho Ah Keau, *alias* Ho She, *alias* Lau Ho She,  
45.

Q. Where were you born?

A. Hong Kong, China.

Q. When did you first come to Hawaii?

A. When I was 18 years old.

Q. How many times have you been back to China? A. Once, 10 years ago.



Q. Do you know the date and the name of the steamer on which you departed?

A. "Korea," about 10 years ago arrived in China just one week before New Years.

Q. Did you get a return permit?

A. No, these are the only papers.

NOTE: Presents

- (1) Affidavit sworn to by herself before the American Consul at Hong Kong to the effect that she is the lawful wife of Lau Ah Leong.
- (2) A marriage certificate dated May 25, 1891, certifying that Lew Ah Leong and Ah Keau were married on that date and signed by C. M. High (authorized to perform the marriage ceremony) witnessed by Ah Lo.
- (3) A certificate from the Board of Health showing the record of marriage of Lew Ah Leong and Ah Keau, license issued by C. P. Gulick May 25, 1891—date of marriage May 25, 1891—place, Honolulu—name of witness—Ah Lo—signed by M. H. Lemon, Registrar General—Cert. dated Aug. 5, 1921. [15]
- (4) An affidavit sworn to by Lau Ah Leong June 13, 1919, to the effect that his son Lau Chong was born in Hawaii—a picture of the applicant Lau Chong is affixed.

Q. What is the name of your husband?

A. Lau Ah Leong, *alias* Lau Fat Leong; I do not know.

Q. Older than you are? A. Yes.

Q. In Honolulu? A. Yes.

Q. How many children have you?

A. Five sons and two daughters that are now dead.

Q. What are the names and ages of your five sons?

A. Lau Ah Wa, 28 or 29; Lau Ah San, 23; Lau Ah Chew, about 21 or 22; Lau Ah Bun, 19; Lau Ah Chong, 12.

Q. Where were your children born?

A. In Hawaii.

Q. Where are they all now?

A. Lau San is on the mainland, all the rest in Hawaii, Lau Chong came with me on the steamer.

Q. Can you give the date of Lau Chong's birth?

A. Third month, I do not know what date—he is 13 by Chinese count (April or May, 1909).

Q. How old was he when he went to China?

A. When he was 2 years old.

Q. Who went to China with him?

A. Myself, Lau Chew, Lau Bun and my two daughters.

Q. Have any of them ever come back to Hawaii?

A. Lau Chew and Lau Bun have returned.

Q. When did they come back?

A. I do not remember.

Q. Very long ago? A. Yes.

Q. Has Lau Chew any other name?

A. I do not know Lau Chew is the only name I know of.

Q. Is that his full name?      A. No.

Q. What is his full name?      A. Lau Chew.

Q. Has Lau Bun any other name?      A. No.

Q. What is Lau Bun's full name?

A. Lau Dart Bun.

NOTE: LAU AH CHU—CI. 1937 green.

LAU TUT BIN—CI. 1938 green arrived from China per SS. "Siberia" Jan. 5, 1914, and were admitted as Hawaiian born—see 3177-C.

NOTE: The passenger list of the SS. "Korea" departing from China Jan 13, 1910, contains the following names:

Mrs. Ah. Keau, 35 years, female, born in China.

Ah Chew, 12 male, U. S. A.

Ah Ping, 6 male, U. S. A.

Ah Chew Tai, 3, female, U. S. A.

Lau Chang, 8 months, male, U. S. A.

Q. What were the names of your two daughters that died in China?

A. Lau Kew Tai and Lau Ah Fee—Al Ah Fee died in Hawaii.

Q. Did you not say that you took two girls with you?      A. Yes.

Q. What was the name of the other girl that went with you?

A. Lau Ah Leck she did not get a paper, she died in China.

Q. Did your husband ever have any other wife except you? A. I do not know.

Q. Did he have any other children by any other woman except you? A. I do not know.

Q. Do you know a woman by the name of Hung Dai Kam? A. No.

Inspector Farmer shows applicant picture of Hung Dai Kam—you know who that woman is?

A. I do not know.

Q. Is it not a fact that that woman was married to your husband by Chinese custom in Hawaii before he was married to you? A. I do not know.

Q. That woman has been recognized as the first wife of Lau Ah Leong your alleged husband on various occasions in this office—she arrived here from China Jan. 7, 1910, and was admitted as the lawful wife of Lau Ah Leong. A. (No answer.)

Q. Do you know any boy by the name of Lau In? A. No.

Q. A girl by the name of Lau Kai Tai? A. No.

Q. A boy by the name of Lau Dung? A. No.

Q. A boy by the name of Lau King? A. No.

Q. All of these and others are alleged by this woman as being her children by Lau Ah Leong?

A. I do not know.

Q. Lau Ah Leong testified in this office on Nov. 26, 1906, and he said he had three wives, one named Hung She, one by the name of Ho She and one by the name of Wong She, and that Ho She and Hung She were then both in Hawaii, you are Ho She, he also testified as to his children and mentioned his children by you as well as his other two wives: do

you mean to say that he could have that other wife in Honolulu with all these children and you also with all of your children and still know nothing about it?

A. I do not know when I was married to Ah Leong I was 18 years old and lived in a different place, far distant away.

Q. Where did you live?      A. Kakaake.

Q. Where did his other wife live?

A. I do not know.

Q. Then how did you know that she lived far distant away from where you lived?

A. I made my husband live far away from me—he sometimes went home at night.

Q. Is it not a fact that your husband has another wife or perhaps a concubine in China?

A. Yes, he has one, she is dead.

Q. What was her name?      A. I do not know.

Q. Was it Wong She?      A. I do not know.

Q. Has he any children by her?      A. No.

Q. Has he not got a boy by the name of Ah Chin by her?

A. I lived at Hong Kong when I was in China.

Q. Has he or has he not a boy by the name of Ah Chin in China born from Wong She?

A. Yes, I heard he has a son by the name of Ah Chin, but I never saw him.

Q. What is your husband's occupation?

A. He is a merchant.

Q. What was he doing at the time you married him?      A. He was a merchant had a small store.

Q. Where was his store?

A. Queen street near an Hawaiian church.



Q. *What* is in Kakaake is it?

A. Near an old Hawaiian church I do not know *that* the place is called.

Q. How far was that store from where you lived?

A. I do not know.

Q. Do you know where you lived? A. Yes.

Q. How far is it from where you lived to the Hawaiian Church? A. Not very far.

Q. You understand do you that you are now under oath testifying before this board of special inquiry and that anything which you say which is not the truth pertaining to a material matter is perjury and that if you tell a falsehood in regard to a material fact you can be prosecuted and punished by fine or imprisonment for the crime of perjury, do you understand that?

4393/1—4382/212

12/9/21 [17]

A. I do not know.

Q. Very well, I will so inform you now that such is the case and you can be punished for perjury for false swearing.

Q. We have received very creditable information to the effect that you and Hung She the former and first wife or concubine of Lau Ah Leong associated together in Honolulu—You understand that I am not saying she was necessarily his lawful wife but she knew you, knew of the fact that you had children by Ah Leong that you were married to him and the circumstances are such that you must have known of her and yet you say that you know nothing whatever about her—what have you to say as to that? A. I have nothing to say.

Q. Then you swear positively do you that Lau Ah Leong never had any wife, concubine, or woman with whom he was living in Honolulu except yourself? A. I do not know.

Q. Hung She knows all about you and she knows about the other women in China and she knows all about your children and Lau Ah Leong knows all about you and the other two women and he has mentioned in this office and testified concerning you and the other two women and numerous children that he had by you and Hung She and one child that he had by the woman in China and yet you profess absolute ignorance of all this—what you say about that?

A. I do not know, I lived at Hong Kong all the time.

Q. You lived in Honolulu from the time you came to Hawaii until 1910 you have so stated yourself and you were married in 1891 and lived here for years and years and Hung She lived here for years at the same time?

A. How could know that for I was not living in the same place with her.

Q. How could you help but know it under such circumstances as these?

A. His other wife lived in a different place from me besides my husband Lau Ah Leong very seldom went home to live with me.

Q. Here is this marriage certificate which you have presented to us saying that Lew Ah Leong was married to Ah Keau, are you that same woman Ah Keau who is mentioned in this certificate?

A. Yes.

Q. Do you think that we can accept your statement as true in regard to that fact?

A. The witness Ah Lo is dead now.

Q. After you have said so many things contrary to evidence which we have before us—things which we have every reason to believe are false how can we believe you in regard to **anything you say?**

A. (No answer.)

Q. All we want is the truth, the whole truth and nothing but the truth. By this you understand it does not necessarily follow that we are going to deny you admission but if we decide your case intelligently we must know the truth.

A. What do I want to lie for?

Q. We do not pretend to say what your motives are but we want to know the truth and we have strong evidence tending to show that you have not told the truth. A. (No answer.)

Q. How old were you when you were married?

A. I was 18 years old.

Q. How long was that after you came to Hawaii from China?

A. I was married to him by correspondence at first.

Q. Well, how long was it before you came to Hawaii that you were married to him by correspondence?

A. I arrived here on Sunday and was married on Thursday.

Q. When were you married to him by correspondence?

A. On the 10th month the year before that.

Mr. LAND.—How old were you when you first came to Hawaii?     A. 18.

Q. You were married by correspondence was that before you left China?     A. Yes.

Q. Then were you married again by American custom as soon as you arrived in Honolulu?

A. Yes.

Q. How long did you live in Honolulu before you returned to China?     A. About 16 or 17 years.

4393/1—4382/212

12/9/21 [18]

Q. Did you ever know a woman by the name of Hung She?     A. No.

Q. Did you at any time during the 17 years that you lived here live in the same house with a woman named Hung She?     A. No.

Q. Do you believe that it is moral and right for a man to have more than one wife at the same time?

A. I do not know.

Q. I asked you if you think it is right for a man to have more than one wife at the same time?

A. No.

Mr. FARMER.—Have you any further statement to make?     A. No.

---

Applicant LAU CHONG sworn testifies:

Q. What is your name and age?

A. Lau Chong; 12 years old.

Q. What was the date of your birth?

A. I do not know I went to China when I was 2 years old.

Q. Where were you born?     A. In Hawaii.

Q. Who is your father?     A. Lau Fat Leong.

Q. How old is he? A. I do not know.

Q. Where is he? A. In Hawaii now.

Q. When did you see him last?

A. Year before last I saw him in China—When he went to China I saw him there.

Q. Who is your mother? A. Ho She.

Q. How old is she? A. 45 years old.

Q. Where is she?

A. She came with me on the steamer.

Q. Is that your mother that came with you?

A. Yes.

Q. How many brothers and sisters have you?

A. Nine brothers—one in China and 8 in Hawaii.

Q. What are their names and ages?

A. Lau Yin, Lau Dung—I do not know how old Lau Yin is—Lau Wang, Lau Kong, Lau Chung, Lau San, Lau Chew, Lau Bin, Lau Chan and myself.

Q. How many sisters have you?

A. One sister, Lau Yuk Nin.

Q. Where were they all born?

A. All born in Hawaii.

Q. Where are they now?

A. I do not know now.

Q. Are any of them in China?

A. Yes, one in China, Lau Chan.

Q. Have all of these brothers and the sister you have mentioned the same father and the same mother as yourself?

A. No—my sister, Lau Wang, Lau San, Lau Chew, Lau Bin and myself have the same mother.

Q. Are your brothers and your sister all living?

A. All the brothers and one sister living.



Q. Lau Yuk Nin is living is she? A. Yes.

Q. Did you ever have any brothers or sister that died?

A. One died in Hawaii and one died in China—two sisters died—the other sister is married now.

Q. Who is the mother of Lau Yin?

A. Hung She.

Q. Where is Hung She? A. In Hawaii.

Q. Who is the mother of Lau Dung?

A. Hung She.

Q. Who is the mother of Lau Kong?

A. Hung She—the mother of Lau Chan is Wong She.

Q. Is Wong She living?

A. She is living in China.

Q. Where have you been living in China?

A. How Bei village, Har Hing Chow, China.

4393/1—4382/212

12/9/21 [19]

Q. Have you been in Hong Kong any of the time?

A. Yes.

Q. How long were you in Kong Kong?

A. Ten days.

Q. You been living in the village have you right along since you went to China? A. Yes.

Q. Is Lau Chan in China?

A. Yes, he is attending school in China.

Q. How many people are living now in your house in China?

A. Lau Chan; Lau Chan's mother, Wong She; and one servant; my mother and myself; my uncle's son, and my auntie's son.

Q. Is that all? A. Yes.

Q. They have been living there right along every year? A. Yes, in the same house.

Q. How old is Wong She? A. I do not know.

Q. Older than your mother?

A. My mother is older—Hung She is the oldest, my mother second and Wong She last.

Q. How many wives has your father?

A. Three wives.

Q. What are their names?

A. Hung She, Ho She and Wong She.

Q. Hung She is in Hawaii? Ho She is your mother coming with you and Wong She is in China, is that correct? A. Yes.

Q. Have you ever seen Hung She?

A. No, I went to China when I was 2 years old.

Q. Has Hung She ever been to China since you went to China? A. No.

Q. Then how do you know that she is your father's other wife? A. My father told me.

Q. Did you ever hear your mother Ho She speak of Hung She? A. Yes, she told me Hung She, Wong She and herself are the wives of my father.

Q. When did she tell you that?

A. A long time ago told me in the village.

Q. Did she tell you that you were born in Hawaii?

A. Yes, she told me that I was born here.

Q. What have you been doing in China?

A. Attending school.

Q. In the village? A. Yes.

Q. How long have you been going to school?

A. Started when I was 7 years old.

Mr. LAND.—Did your mother Ho She and Wong She both live in the same house in the village?

A. Yes.

Q. Can you read and write Chinese?

A. Yes; I do not know English.

Q. Can you speak any English?      A. No.

Q. Have you any further statement to make?

A. No.

---

4393/1—4382/212    [20]

Witness sworn, testifies: CI. 1932 green.

Q. What is your name and age?

A. Lau Ah Leong, *alias* Lau Fat Leong, 65 by Chinese count.

Q. Where were you born?

A. Chung Yuen village, Gar in Chow.

Q. When did you first come to Hawaii?

A. About KS. 5 or KS. 6 (1879 or 1880).

Q. How many times have you been back to China?

A. About four times 1st time, 1903 returned to Hawaii 1904; 2d time, I think 1909 and returned about 6 or 7 months later; 3d time, 1914 or 1915, returned about 7 or 8 months later.

Q. Are you *marrked*?      A. Yes.

Q. What is the name of your wife?

A. Ho She, *alias* Ah Keau.

Q. How old is she?      A. About 44.

Q. Where is she?

A. She came on the "Siberia Maru."

Q. How many children have you by her?

A. Five sons, two daughters; one of the daughters are dead.

Q. Names and ages?

A. Lau Wong, 28 to 30; Lau Ah San I cannot give the ages; Lau Ah Chew, Lau Ah Bin, born in 1913, Alu Ching, that is the applicant—the daughter was adopted by Chong King I do not know *that* her name is—the other girl went to China when she was 3 years old and died there.

Q. Have you a daughter by the name of Lau Yuk Nin? A. She is the one that was adopted.

Q. Where are these sons that you have mentioned and the daughter?

A. Lau Wong and Lau Chew in Hawaii—working in the store—Lau Ah San in New York—Lau Ah Bin attending school here—Lau Ah Chong has arrived from China and Lau Look Nin is in China.

Q. Where were they all born?

A. Punchbowl and Queen—Ah Chong was born on Liliha street corner King—

Q. Did you ever have any other wife except Ho She? A. No.

Q. Did you ever have someone that you thought was your wife?

A. I never called any other woman my wife.

Q. You never called any other woman your wife?

A. In Chinese it can be considered as a wife but in English I cannot call a woman my wife if I am not married to her legally.

Q. What do you mean by being married legally?

A. I don't understand.

Q. Is it not a fact that you were married to a

woman by the name of Hung She otherwise known as Hung Dai Kam?

A. She is not my wife she is working for me.

Q. Didn't you think that she was your wife?

A. No.

Q. Hung Dai She, *alias* Hung She, arrived at this port from China by the steamer "Siberia" Jan. 6, 1910, and at that time you testified and said that she was your lawful wife—the question was asked you, "Well, which is your lawful wife," and your answer was Hung She here is your testimony—(testimony is shown to Lau Ah Leong and explained by interpreter).

A. I do not remember; maybe I made a mistake in answering.

Q. You testified fully in that case—I will ask the interpreter to read everything you said at that time and translate it in Chinese. You also understand some English—page 3 case of Hung Dai Kam ex SS. "Siberia," Jan. 6, 1910, and the date of your testimony was Jan. 7, 1910, after you see that I think you must admit that there could not be any possibility of a mistake—you came to this office for the expressed purpose of testifying in behalf of that woman and securing her admission at this port as your lawful wife—

NOTE.—Interpreter translates and explains the record to the witness.

A. I was not married to this woman she simply lived with me for a period of time.

Q. Then did you tell a falsehood when you testified here at that time?



A. No, in Chinese she can be called my wife but in English she cannot if I am not married to her.  
4393/1—4382/212 12/9/21 [21]

Q. Can a thing be the truth in Chinese and the falsehood in English?

A. She is not married to me and cannot be called my wife in English but can be called my wife in Chinese.

Q. You know very well that she could not be admitted at this port unless she was considered your lawful wife—you said she was—we do not care what language you use when you speak the truth.

A. I did not understand.

Q. We are not going to argue the question with you; we are not going to listen to such foolish talk that you did not understand your own plain words and the purpose for which you actually came here—I will now ask you another question, how many children have you by Hung She?

A. Four sons and four daughters.

Q. How many other wives have you had?

A. One more in China.

Q. What is her name? A. Wong She.

Q. How many children have you by her?

A. One son.

Q. Where was he born? A. Born in China.

Q. Where were Hung She's children born?

A. All born in Hawaii.

Q. And yet you mean to say that you lived with this woman all these years who was not your wife, cohabited with her, had a great many children by

her and yet you mean to say you never thought she was your wife at all?

A. She does not want to get married to me she wants my money so afterwards I married Ho She.

Q. Did you continue living right along with Hung She after you were married to Ho She?

A. She wanted to live with me but did not want to get married to me.

Q. Did you have children born of Hung She after you were married to Ho She?     A. Yes.

Q. You lived right along there in Hawaii with two different women and had children by both of them at the same time?

A. Yes—at that time King Kalakaua was on the throne and the islands were not annexed.

Q. Nevertheless, what you did was a violation at that time and always has been ever since civilization was established here.

(No answer.)

Q. Are you a citizen of the United States?

A. Yes.

Q. How did you become a citizen?

A. Through naturalization.

Mr. LAND.—Q. Did Hung She and Ho She and yourself all live in the same house at that time?

A. Yes, same house, different rooms.

Q. Where was your house at that time?

A. Punchbowl and Queen Streets.

Q. Is the house that is now standing on Punchbowl and Queen Streets with the sign Ah Leong Block above it?     A. Yes.

Q. How long did Hung She and Ho She live in that house? A. Over ten years.

Q. Ho She knew Hung She well during these ten years? A. Yes, they both lived together.

Q. Can you identify Ho She and your son Lau Chung? A. Yes.

(Identification between the witness and his alleged son and wife is mutual.)

Q. Have you any further statement to make?

A. No.

4393/1—4382/212

12/9/21 [22]

Applicant HO SHE recalled, testified:

Mr. LAND.—Q. When you came to Hawaii and married Ah Leong after you arrived here where did you go to live?

A. That place (pointing toward Kakaake).

Q. What street—what house?

A. Near an old Hawaiian church.

Q. Was his store there? A. Yes.

Q. Is that the only house you lived in while you were in Honolulu? A. Yes.

Q. You lived in that house all the time you remained in Honolulu about 17 years or 18 years was there ever a woman living in that same house by the name of Hung She? A. No.

Q. And you never knew a woman by that name in Honolulu? A. No.

Mr. FARMER.—Q. Lau Ah Leong has just testified here himself the man whom you claim to be your husband and he said that you and Hung She both lived together in the same house in different

rooms for ten years in Honolulu at the corner of Queen and Punchbowl Streets?    A. No.

Q. You mean to say that you did not?    A. No.

Q. Is Lau Ah Leong telling the truth or is he telling a falsehood when he said that?

A. I do not know.

Q. You must know, you know whether you lived there with that woman and whether or not she was in that house you could not have lived there ten years without knowing it, why is it that you do not know?

A. I never lived with that woman.

Q. Did you live in the same house in which that woman lived?    A. No.

Q. Your son has testified before this Board and he says that you told him in China that your husband Lau Ah Leong had three wives one of them named Hung She, yourself and Wong She?

A. No, I did not tell him that.

Q. Your son says that Wong She and yourself have both been living in the same house in the village in China—what have you to say as to that?

A. No, I was living at Hong Kong with my mother's relatives Wong She—

Q. How long did you live there in Hong Kong?

A. Since I went to China.

Q. Your son says that you lived in the village all the time after you went to China until you came back to Hawaii and that you just stayed in Hong Kong 10 days.

A. My house in China is all broken down so I

cannot live there and have lived in Hong Kong ever since I went to China.

Q. Then you mean to say that your son, Hung She and that your husband, are all telling falsehoods and that only you are telling the truth.

A. I am telling the truth.

Q. And all the others are telling falsehoods are they? A. I do not know.

Q. Either you are telling a falsehood or the others are telling falsehoods you can't all be telling the truth—which are we naturally to believe?

A. I never tell a lie.

Q. If you did not live for ten years in Honolulu in the same house with Hung She, then, if Lau Ah Leong is telling the truth, you are not his wife, because his wife lived in that house for ten years, do you understand?

A. I was married to him when I was 18 years old.

Q. We can reconcile your statements with the statements of the other witness as in this way—by holding that you are another woman that you are not the real one who was married to Lau Ah Leong.

A. (No answer.)

4393/1—4382/212

12/9/21 [23]

Q. Where has Lau Chong been living?

A. Sometimes living in the village attending school and sometimes with me in Hong Kong—I live at Hong Kong—

Q. Where did he live before he started to school?

A. Hong Kong.



Q. He says himself that he has been living in the village ever since he went to China and that you have been living in the village too in the same house and with your husband's other wife Wong She and several others? A. (No answer.)

Q. Have you any further statement to make?

A. No.

4393/1—4382/212

12/9/21 [24]

Witness sworn, testifies: CI. 12422 red wife of a nat. cit.

Q. Name and age?

A. Hung She, *alias* Hung Dai Kam; 54.

Q. Are you also known as Fung Dai Kim Ah Leong? A. Yes.

Q. Where were you born?

A. Kwai Sin village, China.

Q. When did you first come to Hawaii?

A. 38 years ago.

Q. Have you ever been back to China?

A. Yes, been back once.

Q. When was that?

A. When my daughter was 3 years old, returned when she was 5 years old—she is 17 years now. (See file number 1892—C.)

NOTE: Witness returned from China Jan. 6, 1910, per SS. "Siberia"—the evidence indicated that she departed for China in Jan. 1907.

Q. You are coming here to-day to testify as a witness in the case of a woman who has arrived from China and claims that she is the lawful wife of Lau Ah Leong, is that the purpose for which you are coming?

A. Yes. I am his lawful wife.

Q. When were you married to Lau Ah Leong?

A. 38 years ago I was married to him when I was 17 years old.

Q. Were you married to him in China or Hawaii?

A. In Hawaii.

Q. How long was that after you arrived in Hawaii that you were married? A. One month.

Q. Were you married to him by correspondence before you came?

A. A man brought me here from China, a relative of L. Ah Leong went to the steamer and took a look at me and picked me out to be L. Ah Leong's wife.

Q. And when you arrived here you left Honolulu and went over to Kohala and were married there?

A. I left here on Tuesday, arrived in Kohala on Wednesday and had the party on Sunday.

Q. Were you married according to the regular Chinese custom? A. Yes, real Chinese custom.

Q. Have you a Chinese marriage certificate?

A. Yes, I gave it to my uncle and my uncle gave it to Ah Leong.

Q. It was a regular Chinese marriage certificate of red paper with gilt letters on it? A. Yes.

Q. Did Ah Leong give you one?

A. I have only one certificate; my mother made it out when I was married to Ah Leong I gave it to him.

Q. Was your mother in Hawaii?

A. No, she was in China.

Q. Did she send it from China after you were married?     A. No, I brought the paper with me.

Q. Well, then, if that is the case there must have been some correspondence before you came?

A. At that time when King Kalakaua was on the throne every Chinese was permitted to come here—at that time one of my friends came here to collect his debts and brought my sister and I here—I did not come here directly from China I came here from the coast—my mother made out the certificate and told me when I came here to pick out the man I wanted and to get married to him.

Q. Is it customary for Chinese to tell their daughters to pick out the man they want to marry?

A. She gave me her consent to pick out the man I wanted.

Q. Was your sister also married?     A. Yes.

Q. Whom did she marry?

A. Married to Ching Mock.

Q. Is your sister living now?

A. She is living at Kaimuki.

Q. Was she present in Kohala at the time you were married to Ah Leong?

A. No, she married two weeks later and went to the other islands.

Q. The laws of Hawaii provide that when persons  
4393/1—4382/212

12/10/21 [25]

get married they shall procure a marriage license from an agent in Hawaii and that law was in force at the time you were married to Ah Leong did you or did Lau Ah Leong secure such a license?

A. I did not know what a marriage license was I came here when I was very young—when they had the party I saw Ah Leong with a few pieces of paper in his hand—I did not know what kind of papers they were—there were many guests present Chinese, Hawaiians and White people—my uncle asked Ah Leong if everything was settled up and he said yes.

Q. Then for all you know it might have been that Ah Leong secured the license—you can't say whether he did or did not so far as your own knowledge goes? A. Yes.

Q. By that you mean that you do not know?

A. I do not know—I saw him with papers in his hand—I took it for granted that everything was settled up.

Q. When you applied for a Form 430 paper you testified on August 3d of this year in this way—the question was asked you “Did you get a marriage license?” and you said “No,” I did not know it even now I don't know.

Q. Then after you were married to Ah Leong you started to live with him as his wife did you?

A. Yes.

Q. Do you know this woman Ho She sometimes called Ah Keau? A. Yes.

Q. Did your husband afterwards get married to her? A. I do not know she was my servant.

Q. When did she come to Hawaii?

A. She is 46 years old now she came here when she was 17 years old.

NOTE: This would be about 1891.

Q. Your husband procured a marriage license at

the time he married her—she has produced the certificate and the record showing that the license was granted here is this certificate saying that Lew Ah Leong and Ah Keau were married May 25, 1891, which would be KS. 17 (certificate is shown to witness).

A. I do not know maybe they were married secretly—when I had the two sons and the two daughters I employed her as my servant, my son is 37 now and my daughter 35. The youngest son is 32 and the other daughter 33, she is married.

Q. How many children did you have born before Ho She came to Hawaii? A. Four children.

Q. And you were living with Ah Leong and regarded by him as his wife in all respects?

A. Yes.

Q. Did he have some children born by Ho She?

A. Ho She was pregnant ten months after her arrival in Hawaii and I scolded my husband and intended to send her out and my husband asked my pardon so I did not send her out and do not know of his marriage.

Q. Did she live in the same house with you?

A. Yes, she was working for me and stayed in the same house.

Q. Were you living in Hekala at that time?

A. I was married to Ah Leong on the 9th month on the 4th month of the next year he closed his store at Kohala and came to Honolulu and worked for Lee Look as a salesman in Honolulu, I worked for Lee Look as his cook and did not receive any



payment—then after 3 years we rented a store and a room upstairs for \$7.00 a month.

Q. What we desire to know is where was the house in which you lived at the time Ho Shee was living in the house with you?

A. Corner Punchbowl and Queen Streets.

Q. How long was she living in that house with you? A. Over ten years.

Q. Did your husband ever have any other wife except yourself and this Ho Shee? A. Yes.

4393/1—4382/212.

12/19/21 [26]

Q. How many?

A. One more living in China and two that are dead.

Q. Did he marry any of these before he married you? A. No.

Q. You were absolutely the first one?

A. Yes, I had 4 children before Ho Shee came into the house.

Q. You say he has one living in China and two that are dead when did he marry those?

A. One died about 20 years ago and one died about 10 years ago—all his other wives were servants.

Q. Do you know when he first took them as servants?

A. I do not remember one came to his house 4 years before she died.

Q. Was that before you came to Hawaii?

A. I was in Honolulu then I was living at Punchbowl and Queen Streets.

Q. Then did he have any wife, servant, concubine or woman with whom he lived before his marriage to you?     A. No.

Q. How old was he when you were married to him?

A. He was 28 years old he is 65 years old now.

Q. Could you identify Ho She if you should see her now?

A. She left me 10 years ago; I do not know whether I can or not.

Mr. LAND.—Q. When Ho She came to Honolulu were you living at Queen and Punchbowl Streets?

A. About 12 years.

Q. Did she stay with you in the same house until she left and went to China?

A. No, she went to live in the store at the corner of King and Liliha—my husband ordered her to look after that store there.

Q. Then she lived with you about 12 years at the corner of Queen and Punchbowl then she left and went to Liliha Street?     A. Yes.

Q. And you stayed at Queen and Punchbowl?

A. Yes.

Q. When she returned to China she was living at King and Liliha Street?

A. She went to China a week after I returned here.

Q. When you came back you went to Queen and Punchbowl Streets to live?

A. When I came back I went to the house at the corner of Queen and Punchbowl staid there 2 nights my daughter was living there then, one

of my daughter in laws was living at the corner of King and Liliha Streets and Ho She was living opposite side of the King market.

Q. Where was Ho She living at the time you went to China in 1907? A. Liliha street.

(Witness identifies applicant as Ho She, but Ho She refused to identify the witness and says she does not know her.)

Q. Have you any further statement to make?

A. No.

4393/1—4382/212

12/10/21 [27]

LAU AH LEONG recalled, testifies:

Q. We are informed that you were indicted for the offense of polygamy before the United States District Court in 1909 and a copy of the indictment has been furnished to us in which it is charged that you married a woman by the name of Hung She in 1886 and that you married a woman named Ho She otherwise called Ah Keau in 1908 and it is alleged that you pleaded guilty to that offense and were fined \$500 and sentenced to one hour of imprisonment, is it true that such was the case?

A. Yes, one was married to me and one was not—the woman that is coming here was married to me.

Q. Did you plead guilty of that charge?

A. Yes.

Q. If you pleaded guilty to that charge that is equivalent to an admission on your part that Hung She is your wife because if you had not married both of them you would not be guilty, but when you pleaded guilty would *would* mean that you married both of these women—I had only one wife that is

the one that is married to me the certificate but if the Government wants to fine me I have nothing to do.

Q. It says that you entered a plea of (*nolo contendere*) which means that you did not resist the case and that you permitted sentence to be entered against you if you really only married one wife why did you not fight the case. You must at least had thought that you were married to both of them otherwise why should you permit yourself to be punished for a crime if you really believed that you were innocent?

A. I had no lawyer I was on trial by myself one time with a lawyer and one time without.

Q. Which time was with the lawyer?

A. The last time.

Q. According to these papers we have received the last time you were charged with polygamy and the first time you were charged with cohabiting with more than one woman—if you acted on the advice of a lawyer the last time then at least your lawyer must have considered that there was no use of fighting the case and that you were guilty and therefore you must have thought that Hung She was your lawful wife because of course the lawyer acted on the facts as you told him—I wish also to call your attention to the fact that Hung She has already testified in this case and she says that when she first came to Hawaii about a month after she came she went to Kohala Hawaii and there married to you according to Chinese custom, that you had a wedding feast and so far as she knows all



the formalities of a marriage were observed, and that she thought and considered herself as being your lawful wife and that you treated her as your lawful wife and had four children born of her before Ho She came to Hawaii at all, is that true?

A. No, I married the second wife when my first wife had two children before marrying Ho She I asked Hung She if she wanted to marry me and she said no I only want the money so I asked her if I could marry another woman and she said all right so I married the present wife.

Q. Is it not a fact that you have sold pieces of land to different parties and that Hung She has joined with you in signing the deeds as your wife releasing her right of dower in the conveyances which you have made?

A. When I sell my land the buyer wants the signature of my wife I said that my wife was in China but the buyer said this woman's signature will do.

Q. Did you ever sell any land to any person telling him that your wife was in China and yet he was contented to take the signature of a woman here who was not your wife?

4393/1—4382/212

12/13/21 [28]

A. I had a piece of land given to the son of Hung Dai Kam (Hung She) and he sold it to Mr. Magoon—Mr. Magoon found out I was married to this Ho She and he required her signature—at that time Ho She was here and she signed her name giving her consent.

Q. When was that?



A. About 20 years ago—that was the first time the buyer asked for Ho She's signature—afterwards the buyer of the land did not ask for Ho She's signature.

Q. It seems if the buyer if he was at all wise would have asked you to bring your wife and have her sign it and that you would have brought the woman that you thought was your wife—if you brought Hung She and said that she was your wife—how would the buyer know any different—the buyer generally takes your word as to who your wife is and if you did not regard Hung She as your wife why did you permit her to sign the deed whether or not the buyer asked for it?

A. I never asked her to sign a deed—when the buyer buys land he asks for my signature and I never refer to them that Hung She is my wife.

Q. You are a man that has had a great deal of experience and done a great deal of business, been in Hawaii a great many years; it is difficult to believe that you don't know any better than what you are pretending—you must know better than that—did you want to deceive the men that were buying the land—did you want to sell them land when they really were not getting a good title to it—nobody that buys land is safe in taking it unless the real true wife signs it because if you should die she would come and take  $\frac{1}{3}$  of the land as her right of dower and hold it for the rest of her life—you are not giving them a good title to it. When I sell land I must have a lawyer to investigate about the land before selling it.

Q. No lawyer is going to do such foolish things as fixing up a deed for you without getting your wife to sign it—the one that fixes the deed asks my wife to sign it but I never ask her to sign it.

Q. Whether or not Hung She was really your lawful wife is it not a fact that nevertheless at the first time when she came here and after she came until the other woman came that you really considered her as your wife and thought she was your lawful wife—at that time.

A. No, I paid her every week, if she did not want me to marry another wife she would regard me as her husband. The only thing she wanted is money so she gave her consent to marry this woman.

Q. Did she give her consent to you to marry the other one?

A. No, she did not give me her consent but she allowed me to marry another woman.

Q. Now, I wish to ask you again directly did you or did you not consider Hung She as your wife before Ho She came? A. No.

Q. And yet you lived and cohabited with her and had children by her, did you? A. Yes, I did.

4382/212—4393/1

12/12/21 [29]

Applicant HO SHEE, recalled, testifies:

Q. Where have you been living in China?

A. Hong Kong.

Q. How is it your son says that you and he have been living in the home village?

A. No, I lived with my mother at Hong Kong; my son sometimes went to the village to attend school.

Q. If you and your son lived in Hong Kong why would he make a statement like that?

A. I never went to the village except my son he went once in a while.

Q. Do you know a woman by the name of Wong She?      A. My mother is Wong She.

Q. How many wives has your husband?

A. I do not know.

Q. Isn't Wong She one of his wives who lives in the home village and isn't it a fact that you have been living in the same house with her in China?      A. No.

Statement by Inspector FARMER.—I have been to the office of the Board of Health and searched the record of marriage license—the record is not complete as to license issued in Kohala, Island of Hawaii, in the 80's—there is a record of a few and among them I found that a license was issued to a man by the name of Aliona to marry a woman by the name of Pahela Aliona might possibly refer to Ah Leong and Pahela is an Hawaiian name—it was issued in 1883—no ages were given the date was Aug. 27, 1883, that is all the information.

NOTE: A communication has been sent to Mr. S. C.

Huber, United States District Attorney, informing him of the fact in this case and asking his opinion as to who is the legal wife of Lau Ah Leong and whether Ho She is a citizen if she is his wife—his reply has been received.

LOUIS N. LAND.—I move that the letter sent to Mr. Huber and his reply be placed on file in the records of this case.

MARTHA MAIER.—I second the motion.

EDWIN FARMER.—I concur.

Statement by Inspector FARMER.—In my opinion Hung She ought in justice be considered as the lawful wife of Lau Ah Leong—she has been living with him and has a large number of children by him and has given him material assistance to amass a large fortune, but from the opinion of the United States Attorney as to the law I feel compelled to hold that Ho She is the lawful wife—the marriage of Lau Ah Leong to Ho She in 1891 was accompanied by all the requirements of law including the securing of a license—the marriage of Hung She in 1883 followed by her cohabitation with Lau Ah Leong satisfied all the requirements of law so far as I can see with the exception that there is no evidence that a marriage license was procured and as the Supreme Court of the Territory has held that a license is absolutely necessary to constitute a valid marriage and as in Mr. Huber's opinion we cannot presume that a license was issued to Hung She but must have positive proof of it under the circumstances of this case or else the marriage is void and as no evidence has been adduced and there is no likelihood that it can be adduced showing that a license was issued for the marriage to Hung She, I am forced to the conclusion that Ho She is the lawful wife and as Lau Ah Leong is a citizen she is admissible as



the wife of a citizen under the Chinese Exclusion law—in my opinion there is no ground for denying the applicant under the immigration law although she is an alien and therefore I see no course open  
4382/212—4393/1 12/19/21 [30]

to us but to admit her, however unworthy she may be.

### MOTION.

LOUIS N. LAND.—I move that the applicant Ho She be admitted as the wife of a naturalized citizen, and that Lau Chong be admitted as Hawaiian born. [31]

MARTHA MEIER.—In this case I cannot agree with the majority of the Board and believe that this applicant Ho She should be denied admission for the following reasons: that she is a person who believes in and has practiced polygamy—this is shown by the fact that her alleged husband was convicted upon two different occasions in the local Federal Court for bigamy—at that time the Parke vs. Parke decision had not been rendered but the courts in this Territory were working under the Godfrey-Rowland decision, a copy of which is a part of the record in this case. The records show that the alleged husband has still another wife in China who has a son by him and the testimony of the 12 year old son of this applicant shows that his mother and the #3 wife Wong She had been living together in the same house in China—and the testimony of the alleged husband in 1910 shows that Hung She and this applicant Ho She were his wives at that time—he testified that Hung



She was his first wife—that Ho She was the second, and from his conviction in the local Federal Court it shows that he did live and cohabit with these two women in Hawaii and it is common knowledge that they did live together here in one house in this city although this applicant Ho She disclaims any knowledge of Hung She and the woman who is now living in China known as Wong She and by stating that she did not live in the home village but stayed in Hong Kong which is contradictory to the testimony of her son and to the testimony of her alleged husband L. Ah Leong she offers as the excuse for not living in the home village that the house was old and broken down but the testimony of Hung She in 1910 shows that the house was built only about 7 years previous to that, that while L. Ah Leong was in China at that time he married this woman, Wong She as to leave in charge of the house.

From the testimony offered by all parties concerned, other than Ho She, it appears that Ho She does know Hung She, who is now in Hawaii, and the woman in China that is named Wong She—it therefore appears that she knows well her alleged husband's marital relations with these two women, and knowing this and still continuing to live with him and be supported by him and returning here to join him she certainly believes in and practices polygamy.

Even if Hung She, who is here in Hawaii is not the lawful wife of Au Ah Leong he still has the #3 wife, Wong She, in China. By this appli-

cant Ho She disclaiming all knowledge of Hung She who has appeared at this office, testified in this case and identified this woman, it shows that the applicant thought that if she said that she knew Hung She and that Hung She was one of the wives of her alleged husband that she would be denied admission therefore she tried to gain admission by making false and misleading statements for the Board of Special Inquiry—it might be well to know that if the woman Ho She had never been in Hawaii before and was coming here for the first time and there were as many discrepancies between her statement and her alleged husband's statements as there are in this case, she would be denied on the ground that she had not proved that she was the wife of the person to whom she came to join. In this case it seems that her actions speak louder than words. [32]

EDWIN FARMER.—I concur with Mr. Land's motion. There is plenty of evidence to show that Lau Ah Leong is a polygamist and there is no evidence so far as I can see, to show that Ho She is a polygamist or believes in polygamy although there are discrepancies in the testimony and she does not admit having committed a crime or misdemeanor involving moral turpitude, although we may believe that she does not tell the truth about certain facts because her testimony differs from that of the others this is not a ground for denying admission.

MARTHA MAIER.—I cannot agree with the majority of the Board and appeal from the landing decision.

EDWIN FARMER to APPLICANT.—You are informed that the majority of the Board of Special Inquiry have voted to admit you, but one member has dissented from the majority of the Board and voted to deny you on the ground that you are a person who believes in and practices polygamy and as a person who has made false and misleading statements to the Board of Special Inquiry, and has appealed from the decision of the majority of the Board. You have the right to an attorney to represent you on appeal if you so desire—should the appeal be sustained you will be returned to China at the expense of the owners of the steamer on which you came, in the same class as that in which you came, namely, cabin—but if the appeal is dismissed you will be admitted. I concur as to the admission of Lau Chong, Hawaiian born.

Certified to be correct.

Stenographer.

4393/1—4382/212

12/19/21 [33]

---

In the District Court of the United States, in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Return of Richard L. Halsey, Respondent, to Order to Show Cause. Filed Mar. 4,

1922. (Sgd.) Wm. L. Rosa, Clerk. S. C. Huber, United States Attorney, N. D. Godbold, Assistant U. S. Attorney, O. P. Soares, Assistant U. S. Attorney, Attorneys for Respondent.

Due and legal service of the within return to order to show cause is hereby accepted and receipt of a copy thereof acknowledged this 6th day of March, A. D. 1922.

(Sgd.) HARRY IRWIN,  
J. LIGHTFOOT,  
Attorneys for Petitioner. [34]

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Return of Richard L. Halsey, Respondent, to Order  
to Show Cause.**

To the Honorable JOSEPH B. POINDEXTER,  
Judge of the United States District Court, in  
and for the District of Hawaii:

Comes now Richard L. Halsey, respondent herein, and in obedience to your Honor's order, hereby makes the following return to the order to show cause issued in the above-entitled matter.

I.

That respondent is now, and for more than five years last past has continuously been, United States Immigration Inspector-in-charge at the port of Honolulu.



II.

That he denies each and every paragraph and allegation contained in petitioner's application for writ of habeas corpus, filed herein, except as hereinafter admitted or otherwise denied. [35]

III.

That applicant, Ho Ah Keau, otherwise known as Ho Shee, is an alien, a Chinese, and a citizen of the Republic of China.

IV.

That said applicant, Ho Ah Keau, arrived at the port of Honolulu on board the steamship "Siberia Maru" on the 7th day of December, 1921, and was held for examination before a Board of Special Inquiry.

V.

That thereafter, to wit, on the 9th day of December, 1921, a Board of Special Inquiry was duly convened, before which said Board of Special Inquiry a hearing was had to determine said applicant's right to enter the United States, which said hearing was concluded on the 19th day of December, 1921. That after duly considering the evidence adduced at said hearing, a majority of said board found in favor of the admission of said applicant and one member of said board voted to deny the admission of said applicant, said dissenting member appealing from the decision of the majority of said board to the Secretary of Labor. That the action of said board as to the finding of the several members thereof and the noting of an appeal by the dissenting member from the deci-



sion of the majority, are as stated in paragraphs V and VI of said applicant's petition, which said paragraphs V and VI are hereby admitted.

#### VI.

That the record of the said hearing before said Board of Special Inquiry is attached to applicant's petition, as alleged in paragraph VII thereof, which said [36] record is hereby, by reference made a part of this return.

#### VII.

That the Secretary of Labor of the United States, after duly considering said appeal, sustained the decision of the dissenting member and thereby determined that said applicant was not lawfully entitled to be admitted to the United States; that a copy of the finding of the said Secretary of Labor, upon said appeal, is hereby attached, marked Exhibit "A" and hereby made a part of this return.

#### VIII.

That the said finding erroneously reads: "It is recommended that the appeal be denied," instead of reading: "It is recommended that the appeal be sustained and her deportation directed," as shown by a reading of Exhibit "A," hereinabove referred to, and as further shown by letter of Special Assistant Secretary of Labor, F. H. Larned, dated February 14, 1922, copy of which is hereto attached, marked Exhibit "B," and hereby made a part of this return, and by letter of said F. H. Larned, Special Assistant, dated February 11, 1922, a copy of which is hereto attached, marked

Exhibit "C," and hereby made a part of this return.

IX.

That the hearing and determination upon appeal by the Secretary of Labor was a full, fair and impartial hearing and determination, and conducted in all respects in the manner required by law. [37]

X.

That respondent has said applicant in his custody at the Immigration Station in Honolulu and is there holding her for deportation to China, the country from whence she came, solely by reason of the finding and order of the Board of Special Inquiry, as herein alleged, and by reason of the finding and order of the Honorable Secretary of Labor upon appeal, as herein stated.

WHEREFORE, respondent prays that the writ of habeas corpus prayed for in applicant's petition be denied at her cost.

(Sgd.) RICHARD L. HALSEY.

The United States of America,  
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn, according to law, deposes and says, that he is the Richard L. Halsey, who has made the return to the order to show cause in the above-entitled cause; that he has read the said return and knows the contents thereof and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 4th day of March, A. D. 1922.

[Seal] (Sgd.) WM. L. ROSA,  
Clerk, United States District Court, Territory of  
Hawaii. [38]

**Exhibit "A."**

55125/327

February 8, 1922.

In re HO SHEE, *alias* AH KEAU.

The case comes before the Board of Review on appeal.

Attorney Hott heard.

This is the case of a Chinese woman applying for admission to Hawaii on the ground that she is the wife of a Chinese resident there whose citizenship is conceded. The attorney in this case does not represent the applicant, but on the other hand, represents one Hung Shee, a resident of Hawaii, whom he alleges is the lawful wife and, therefore, he urges that the present appeal be denied.

It appears that the alleged husband in this case is a very wealthy man, being reputed to be worth about \$750,000, and it is apparent there are some steps on foot to defeat the interest of the alleged legal wife, Hung Shee.

We will first consider the evidence tending to show that one Hung Shee, is the lawful wife of the man in question, Lau Ah Leong, *alias* Lay Fut Leong. It appears that Hung Shee has had 13 or 14 children by Leong, 7 of whom are still living. The record shows that in 1910 when the

man appeared as a witness, he testified that Hung Shee was his wife. Everything in the record points to the fact that she is his lawful wife. There is but one piece of evidence in this relationship missing, and that is the marriage certificate. It is easy to understand how a document of this nature pertaining to a ceremony celebrated approximately 35 years ago can be lost, and it is not believed the fact that this document cannot now be presented in evidence should serve as a bar to the claimed relationship. It is believed reasonable to hold that the fact that this man lived with her openly and notoriously for such a long period of time, and that he has officially recognized her as his wife, and that she to all intents and purposes is his wife, raises a reasonable presumption that the marriage is valid.

Now just a word in regard to the claim of the present applicant, Ho Shee. This woman claims to have married Leong about 1891 and that she went back to China January 13, 1910, and is at present returning from that trip. There are many discrepancies in the testimony of this woman; for instance, Leong and Hung Shee testified that the real Ho Shee lived in the same house with Hung Shee from the time of her arrival in 1891 until the time she went to China in 1910. Leong and an alleged son of Ho Shee, who came on the same boat with applicant, testified that Ho Shee lived in the same house in China with Leong's third wife in 1910 until the time she came to Honolulu on the present trip. Regardless of this testi-



mony, however, the applicant denies [39] that  
55125/327 February 8, 1922.

she ever lived in either of these houses. She likewise denies what has been very positively established, to wit, that Leong had any other wives or children by other wives.

The burden of proof naturally falls on the applicant in this class of cases. In regard to the alleged marital status of Hong Shee and Leong, it is noted that there are two adjudications against Leong for living in adultery with the real Ho Shee. On one occasion he was fined \$300, and on another occasion when he was arrested for living with Ho Shee he entered a plea of "*nolo contendere*" and was given a brief imprisonment and fined \$500 and costs.

This board is satisfied that the best evidence favors the recognition of the validity of the marriage between Hong Shee and Leong. It further believes that the real Ho Shee is not identical with the present applicant.

It is recommended that the appeal be denied.

ROBE CARL WHITE,  
Chairman, Board of Review.

ES/AVM.

So ordered:

E. J. HENNING,  
Assistant Secretary. [40]



No. 55125/327

February 4, 1922.

In re HO SHEE, *alias* AH KEAU.

MEMORANDUM FOR THE ASSISTANT SECRETARY.

The above-named Chinese woman is applying for admission to the United States as the wife of a citizen thereof, the citizenship of Lau Ah Leong, the alleged husband, being conceded. Two members of the Board of Special Inquiry which handled the case at Honolulu have voted to admit, while one member has dissented, appealed from the majority opinion, and thereby caused the record to come before the Bureau and Department for review.

At the outset it may be stated that the case has not been very satisfactorily handled at Honolulu, and the dissenting member of the board seems to be the only one who has not overlooked the fact that the burden of proof, in a matter of this kind, is by law, clearly upon the Chinese person applying for admission as one to whom the provisions of the Chinese Exclusion Laws do not apply. The Chairman of the Board has increased his own difficulties by referring the case to the United States Attorney at Honolulu for his opinion upon the legal questions thought by the Chairman to be involved, and the sum total of the United States Attorney's opinion to the Chairman is that, if the Chairman and the board, are satisfied that Ho Shee is the wife of the claimant husband, then she is entitled to admission, an opinion which is en-

tirely correct, as far as it goes. In rendering his opinion, however, the United States Attorney has indulged in a lengthy discussion of the doctrine of presumptions, as applied to the marriage laws and customs of the Territory of Hawaii, and has practically instructed the Chairman of the board, that, under the conditions, the presumption of the legality of the marriage of the applicant to the claimed husband is to govern, because of the fact that when her marriage to the claimed husband took place, a regular license was shown to have been procured by the contracting parties; whereas, in the case of a former alleged wife, one Hung Shee, by name, proof is lacking that the necessary license was procured. It appears that the Hawaiian courts do not recognize Common Law marriages; that where a showing of a regular marriage is made and the parties have lived together and held themselves out to the public as man and wife, a presumption exists that the marriage was solemnized in accordance with the statutory requirements; but that this presumption is overcome by the production of another party of record or documentary evidence that a subsequent marriage was actually gone through and that all of the formalities were complied with. The United States Attorney's letter to the Chairman of the board was correct in setting forth that if the board was satisfied that Ho Shee were actually the legal wife of the claimed husband, admission should take place, a fact with which the Chairman was no doubt fully conversant, but he was not correct in holding that the board should

be guided and governed by the doctrine [41] of No. 55125/327

presumption as applicable to marriages in Hawaii. It does not appear to the Bureau that it is necessary for the claimed wife, residing now in Honolulu, to present any evidence whatever to the board that she is the legal wife of Lau Ah Leong. That is purely a collateral question. The question for the board to determine is whether or not the evidence presented by Ho Shee, considered in the light of all surrounding circumstances, favorable as well as unfavorable, establishes that she is the legal wife of a citizen of the United States. If it does, then she should be admitted; otherwise, she should be excluded. It is not for the board to decide which of the two women, if either, is the wife of the claimed husband, but simply whether the applicant has reasonably established her claims in that connection.

In weighing the evidence presented in behalf of the applicant it would have been, and was, quite competent for the board to consider the evidence submitted by other parties, tending to show that the claimed husband already had a wife living in the Hawaiian Islands. There is ample evidence in the record to show a clear possibility that the woman now living in Honolulu, and claiming to be the wife of Lau Ah Leong, actually is his wife, and this one circumstance, it seems to the Bureau, is sufficient to cast a substantial doubt upon the claim of the applicant.

In the person of the alleged husband of this applicant, the Government is quite clearly dealing with a Chinese who believes in the practice of concubinage, as known to the Chinese, if not in fact, as suggested by the dissenting member, in the practice of polygamy. The evidence shown that Lau Ah Leong has at various times cohabited with, and apparently held out to the public, two, three and perhaps four women, by all of whom he has had children. He has quite clearly violated every law and principle of decency as known to our system of Government, and is entitled to very little consideration or credence in connection with the issues to be determined in this proceeding. After holding out one Hung Shee to the public as his real legal wife for a period of time covering some thirty-eight years, he now appears and claims the present applicant, with whom he has concededly gone through a marriage ceremony, as his wife.

The record shows that about 1883 Lau Ah Leong was married to one Hung She, by whom he has had some fourteen children; that in 1891 he married a person named Ah Keau, with whom the present applicant claims to be identical. At the time this ceremony with Ah Keau was gone through, Hung Shee was still living in Honolulu, and Lau Ah Leong, apparently at the same time, held her out as his wife. There is also record evidence that he has upon occasions referred to Hung Shee as his first wife and Ho Shee as his second wife, plainly showing that he has, in a civilized [42] No. 55125/327



community openly and apparently notoriously, practiced concubinage, as known to the Chinese. He is now seemingly endeavoring to take advantage of the technicalities of American law to do what he could not do under the Chinese custom, which permits of the practice of concubinage, and substitute a second wife or concubine, for what, under the Chinese custom, would be the first and legal wife. There is ample reason for believing, however, that the first marriage, that to Hung Shee, was properly solemnized, and that the subsequent marriage to Ah Keau (applicant) was bigamous. The courts of Honolulu have themselves passed upon this feature and have imposed a fine and nominal jail sentence of three months upon Lau Ah Leong for his bigamous marriage to Ah Keau. In 1907 Lau Ah Leong, pleaded guilty and paid a fine of three hundred dollars for unlawful cohabitation with Ho Shee (who applicant claims to be) and others. He at that time made no defense of marriage to Ho Shee. On March 21, 1910, a grand jury, in the United States District Court for the District of Hawaii indicted Lau Ah Leong for bigamy, charging that on the 25th day of October, in the year 1886, he married Hung Shee, and did then and there have her for wife; and that Lau Ah Leong in 1908 did knowingly and unlawfully and feloniously marry and take as his wife one Ho Shee, otherwise called Ah Keau, the said Hung Shee being then and there living and in full life. Lau Ah Leong entered a plea of *nolo contendere*, was given a short imprisonment and fined \$500 and



costs. It will be observed in this proceeding, as well as in the one in 1907, for unlawful cohabitation, he failed to make any defense, and did not bring in any proof of his alleged lawful marriage to Ah Keau in 1891, well knowing, apparently, that such marriage was bigamous and would not help his case, and knowing also that under the conditions then existing, Hung Shee would probably not have as much difficulty in proving the strict compliance with the technical requirements as she would have a number of years later.

The Federal authorities, of course, are not bound by any such narrow rule in reaching a determination of the issues on this case as that attempted to be set down by the United States Attorney at Honolulu. The fact that the record abounds with evidence that Lau Ah Leong was married to another woman long before he went through the ceremony in 1891 with Ah Keau at which time the woman to whom he was first married was still living, is sufficient to cast a substantial doubt upon the fact of the legal marriage to Lau Ah Leong of Ah Keau, with whom the present applicant claims to be identical. That Ah Keau is not his wife is shown by his own actions and testimony, covering a period of many years, during which he has always held out the other woman as his first wife, and has never claimed Ah Keau to be his wife.

In addition to the reasons which exist for doubting that a person named Ah Keau is really the legal wife of Lau Ah Leong, there is also evidence in the present record which tends to indicate

that the present applicant is not identical with the Ah Keau (Ho Shee) with whom Lau Ah Leong went through the ceremony in 1891. In the present case, Lau [43] Ah Leong has testified No. 55125/327

that he has a third wife, one Wong Shee, living in China, and that Ho Shee, while in China lived in the same house with this third wife. The applicant, however, denies that she ever lived with the wife in China, and denies that her alleged husband ever had any other wives; although the evidence shows that Ho Shee, or Ah Keau, when in Honolulu, lived with the first wife and should have knowledge of her. She also claims to have no knowledge of the numerous children resulting from the cohabitation of Lau Ah Leong and Hung Shee, in Honolulu, and Wong Shee in China. This surprising lack of knowledge on the part of Ho Shee, as to the other marital ventures of her alleged husband, casts a substantial doubt upon her being identical with the woman who took part in the 1891 marriage and who departed for China in 1910. There are no photographs from which identification could be made.

The Bureau, after careful consideration, is of the opinion that the evidence in this record clearly fails to establish that Ho Shee, or Ah Keau, is of the classes exempt from the operation of the Chinese Exclusion Laws. She claims to be married to a citizen of the United States, but the evidence fails wholly to support her claim. The evidence fails to show that the ceremony between Ho Shee,

or Ah Keau, and Lau Ah Leong in 1891 was valid, and incidentally, it fails to establish that the present applicant is identical with the female party to that apparently unlawful proceeding. It is settled that the burden of proof in a case of this kind is upon the applicant; and that the decision of the administrative authorities, based upon some evidence, after fair hearing, is final. The District Court of Honolulu, before which this case may go on habeas corpus, and the Circuit Court for the Ninth Circuit, to which it may go on appeal, have affirmed these fundamental principles so often that it is unnecessary to cite decisions. In this case, the hearing has been fair in every respect, and there is ample evidence to justify the conclusion that the status of the applicant has not been established. The Bureau, being of the opinion that the burden of proof has not been sustained, recommends that the appeal of the dissenting member be sustained, and that the applicant's request for admission to the United States be denied.

For the Commissioner General,

---

Special Assistant.

CEB.

Ralston & Hott.

Oral hearing requested. [44]

**Exhibit "B."**

U. S. DEPARTMENT OF LABOR.  
BUREAU OF IMMIGRATION.  
WASHINGTON.

Address reply to

Commissioner General of Immigration

and refer to

No. 55125/327.

February 14, 1922.

Inspector-in-Charge,

Immigration Service,

Honolulu, T. H.

Referring again to your files Nos. 4393/1 and 3282/212, the Bureau desires to explain its letter to you of the eleventh instant. Instead of saying that "the appeal of Ho Shee, *alias* Ho Ah Keau, has been dismissed," it should read, "the appeal in the case of Ho Shee, *alias* Ho Ah Keau, has been sustained and her deportation directed." The error in the wording of the letter was due to the fact that most appeals are taken by aliens excluded and when the letter was written the fact was overlooked that Ho Shee was not the appellant in this case, the case having been appealed against her by one of the members of the board of special inquiry. It is believed, however, that, taking the letter as a whole, you will understand the meaning of it even without this explanation, and especially in view of the fact that the Bureau's record in the case, including the department's decision, was certi-



fied and sent you for use in possible habeas corpus proceedings.

For the Commissioner General:

(Sgd.) F. H. LARNED,

Special Assistant.

WCW. [45]

**Exhibit "C."**

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

WASHINGTON.

Address reply to

Commissioner General of Immigration

and refer to

No. 55125/327.

February 11, 1922.

Inspector-in-Charge,

Immigration Service,

Honolulu, T. H.

In reply to your letter of Jan. 5, 1922, No 4393/1, 4382/212, you are advised that the appeal of Ho Shee, *alias* Ho Ah Keau, has been dismissed.

The exhibits in the case are herewith returned, and there is also being sent you herewith, in accordance with your request, Bureau file No. 55125/327, duly certified, covering the case of Ho Shee. It is requested that the same be promptly



returned when no longer needed in connection with the expented habeas corpus proceedings.

For the Commissioner General:

(Sgd.) F. H. LARNED,

Special Assistant.

WCW.

Incl. 5574 (certified record).

Incl. 5675. [46]

---

In the District Court of the United States in and for the Territory of Hawaii. Demurrer of Petitioner to Return of Richard L. Halsey, Respondent, to Order to Show Cause. Filed March 6, 1922. (Sgd.) Ritchie G. Rosa, Deputy Clerk. Harry Irwin, J. Lightfoot, Attorneys for Petitioner. [47]

In the District Court of the United States in and for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU, Otherwise Known as HO SHE, for a Writ of Habeas Corpus.

**Demurrer of Petitioner to Return of Richard L. Halsey, Respondent, to Order to Show Cause.**

Now comes Ho Ah Keau, otherwise known as Ho She, and demurs to the return of Richard L. Halsey, Esq., to order to show cause filed herein and for cause of demurrer says:

That said return to said order to show cause does not show any lawful reason why the said Richard L. Halsey, Esq., United States Immigration Inspector at large, at the port of Honolulu, should imprison, restrain or deprive of her liberty the said Ho Ah Keau, otherwise known as Ho She.

WHEREFORE, petitioner prays, as she has heretofore prayed, that said writ of habeas corpus be granted.

Dated Honolulu, T. H., March 6, 1922.

HO AH KEAU,

Otherwise Known as HO SHE.

By (Sgd.) J. LIGHTFOOT,

Her Attorney.

Receipt of a copy of the foregoing petition is hereby acknowledged this 6th day of March, A. D. 1922.

(Sgd.) S. C. HUBER,

United States Attorney. [48]

---

In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Motion for Leave to Amend Petition for Writ of Habeas Corpus. Filed March 6th, 1922. (Sgd.) Ritchie G. Rosa, Deputy Clerk. Harry Irwin, J. Lightfoot, Attorneys for Petitioner. [49]

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU,  
Otherwise Known as HO SHEE, for a Writ  
of Habeas Corpus.

**Motion for Leave to Amend Petition for Writ of  
Habeas Corpus.**

Now comes Ho Ah Keau, otherwise known as  
Ho Shee, petitioner above named, and moves this  
Honorable Court for leave to amend the petition for  
writ of habeas corpus, filed herein, by adding to  
said petition, on page 5 thereof, and immediately  
before the prayer thereof, the following:

“5. That the proceedings had before the  
Department of Labor and Bureau of Immi-  
gration, on the appeal so taken from the Board  
of Special Inquiry, as aforesaid, were pre-  
judiced and unfair and constituted a mere  
semblance of a passing upon the matters and  
things raised by said appeal.

“6. That the Chairman of the Board of Re-  
view, to whom said appeal was submitted,  
recommended that the appeal be denied, show-  
ing that he, the said Chairman of the Board  
of Review had failed to consider the said  
appeal on its merits.

“7. That the Secretary of Labor, in order-  
ing that the said appeal be sustained, if he  
did so order, was acting upon evidence, or  
supposed evidence, not adduced before the

Board of Special Inquiry, in contravention of Section 17 of an Act Regulating Immigration of Aliens to, and Residence of Aliens in, the United States, approved February 5th, 1917." [50]

And petitioner further prays that in case this motion shall be granted the Clerk be instructed to attach to the petition the said amendments.

This motion is based on the record in the above-entitled cause and on the affidavit of J. Lightfoot hereto attached and made a part hereof.

Dated, Honolulu, T. H., this 6th day of March, 1922.

(Sgd.) J. LIGHTFOOT,  
Attorney for Petitioner.

Service of a copy of the foregoing motion is acknowledged, this 6th day of March, A. D. 1922.

(Sgd.) S. C. HUBER,  
United States Attorney. [51]

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU,  
Otherwise Known as HO SHEE, for a Writ  
of Habeas Corpus.

**Affidavit of J. Lightfoot in Support of Motion for  
Leave to Amend.**

United States of America,  
Territory of Hawaii,—ss.

Now comes J. Lightfoot, and being first duly sworn, on oath deposes and says:

That on or about the 28th day of February, A. D. 1922, affiant was informed by Richard L. Halsey, Esq., United States Immigration Inspector-in-charge at the port of Honolulu, that the appeal to the Secretary of Labor, noted by a member of the Board of Special Inquiry, appointed to consider the case of said Ho Ah Keau, otherwise known as Ho Shee, had been sustained;

Thereupon affiant visited the office of said Richard L. Halsey, Esq., and was shown the order sustaining the said appeal, and was likewise shown certain other documents relating to said case, in the possession of said Richard L. Halsey, Esq.;

That the said other documents, which included the documents attached as exhibits to the return of said Richard L. Halsey, to the order to show cause, were in their nature confidential, and therefore affiant was unable to make use of the same;

That when the said exhibits were attached to the [52] return to the order to show cause as aforesaid, affiant found that it would be necessary to move this Honorable Court for leave to amend the petition for writ of habeas corpus, by adding thereto the paragraphs contained in said amendment;

That affiant does not believe that said petitioner can safely proceed to trial without the addition of said amendments.

Dated, Honolulu, T. H., this 6th day of March, A. D. 1922.

(Sgd.) J. LIGHTFOOT.



Subscribed and sworn to before me this 6th day of March, A. D. 1922.

[Seal] (Sgd.) THERESA CLARK,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii. [53]

---

In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho She, for a Writ of Habeas Corpus. Order Overruling Demurrer *Pro Forma* and Admitting Petitioner to Bail Pending Final Determination of Cause. Harry Irwin, J. Lightfoot, Attorneys for Petitioner. Filed Mar. 6, 1922. (Sgd.) Wm. L. Rosa, Clerk. [54]

In the District Court of the United States in and for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU, Otherwise Known as HO SHE, for a Writ of Habeas Corpus.

**Order Overruling Demurrer Pro Forma and Admitting Petitioner to Bail Pending Final Determination of Cause.**

And now, on this 6th day of March, A. D. 1922, coming on for hearing before me, in the above-entitled cause, the petition of Ho Ah Keau, otherwise known as Ho She, for a writ of habeas corpus upon the order to show cause issued herein upon the return of Richard L. Halsey, Esq., United States Immigration Inspector-in-charge at the

port of Honolulu, and upon the Demurrer of petitioner filed herein.

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1st. That the said demurrer be and the same is hereby overruled *pro forma*;

2d. That a writ of habeas corpus issue herein returnable on Monday, the 13th day of March, A. D. 1922, at 2 o'clock P. M. before said court, and that under said writ the said Ho Ah Keau, otherwise known as Ho She, shall be enlarged and set at liberty pending the final determination of this cause upon her giving a bond in the sum of two thousand dollars (\$2,000.00) conditioned for her appearance in said court when thereunto ordered by a judge thereof; said bond to be approved as to form by the United States District Attorney, and as to sufficiency of sureties by the Clerk of said court.

Done in open court this 6th day of March, A. D. 1922.

(Sgd.) J. B. POINDEXTER,

Judge. [55]

---

In the District Court of the United States in and for the District and Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho She, for a Writ of Habeas Corpus. Bond. Filed Mar. 6, 1922. (Sgd.) Wm. L. Rosa, Clerk. [56]

**Bond.**

KNOW ALL MEN BY THESE PRESENTS: That we, Ho Ah Keau, otherwise known as Ho Shee, as principal, and L. Ah Leong and Ah Seong Lau, as sureties, are held and firmly bound unto the United States of America in the penal sum of Two Thousand Dollars (\$2,000.00) for the payment of which well and truly to be made to the United States of America, we bind ourselves, and our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas heretofore and on, to wit, the first day of March, A. D. 1922, the above-named principal filed in said court a petition for a writ of habeas corpus, commanding Richard L. Halsey, Esq., United States Immigration Inspector-in-charge at the port of Honolulu, to produce the body of her, the said Ho Ah Keau, sometimes called Ho Shee, before the said court, then and there to do and receive what shall be considered in her behalf; and

WHEREAS, upon issue joined, the Honorable J. B. POINDEXTER, on the 6th day of March, A. D. 1922, ordered that a writ of habeas corpus issue, commanding said Richard L. Halsey, Esq., United States Immigration Inspector-in-charge as aforesaid, to forthwith produce before said court the body of said Ho Ah Keau, otherwise known as Ho Shee; and [57]

WHEREAS, the said Honorable J. B. POIN-DEXTER further ordered that the said Ho Ah Keau, otherwise known as Ho Shee, be released on recognizance pending the final determination of said cause, upon her giving a good and valid bond with sureties, in the sum of two thousand dollars (\$2,000) conditioned that she, the said Ho Ah Keau, otherwise known as Ho Shee, will appear in said court whenever thereunto ordered by a Judge thereof, to do and receive what shall finally be determined in her behalf.

NOW, THEREFORE, if the said Ho Ah Keau, otherwise known as Ho Shee, shall duly appear in said United States District Court in and for the District and Territory of Hawaii, whenever thereunto ordered by a Judge of said court, then and there to do and receive what shall be finally determined in her behalf, then this obligation shall be void, otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF, we, the said principal, and the said sureties have hereunto set our hands and seals this 6th day of March, A. D. 1922.

(Sgd.) HO AH KEAU,

Otherwise called HO SHE,

her

Witness: J. LIGHTFOOT. X (Seal)

mark.

Principal.

(Sgd.) L. AH LEONG and (Seal)

“ AH SEONG LAU, (Seal)

Sureties.

Approved as to form:

(Sgd.) S. C. HUBER,  
U. S. District Attorney.

Approved as to sufficiency of sureties:

(Sgd.) WM. L. ROSA,  
Clerk U. S. District Court. [58]

---

In the United States District Court, in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Return of Richard L. Halsey, Respondent, to Writ of Habeas Corpus. Filed Apr. 7, '22. (Sgd.) Wm. L. Rosa, Clerk. S. C. Huber, United States Attorney. N. D. Godbold, Assistant U. S. Attorney. O. P. Soares, Assistant U. S. Attorney.

Due and legal service of the within return to writ of habeas corpus is hereby accepted and receipt of a copy thereof, acknowledged this 7 day of April, A. D. 1922.

(Sgd.) J. LIGHTFOOT,  
Attorney for Petitioner. [59]



In the United States District Court, in and for the  
Territory of Hawaii.

In the Matter of the Application of HO AH KEAU,  
Otherwise Known as HO SHEE, for a Writ  
of Habeas Corpus.

**Return of Richard L. Halsey, Respondent, to Writ  
of Habeas Corpus.**

To the Honorable JOSEPH B. POINDEXTER,  
Judge of the United States District Court, for  
the District of Hawaii:

Comes now Richard L. Halsey, respondent herein,  
and hereby makes the following return to the writ  
of habeas corpus issued in the above-entitled mat-  
ter:

I.

That respondent is now, and for more than five  
years last past has been, United States Immigra-  
tion Inspector-in-charge at the port of Honolulu,  
T. H.

II.

That he denies each and every paragraph and alle-  
gation contained in petitioner's application for writ  
of habeas corpus, filed herein, except as hereinafter  
admitted or otherwise denied. [60]

III.

That applicant, Ho Ah Keau, otherwise known as  
Ho Shee (hereinafter referred to as Ho Ah Keau),  
is an alien, a Chinese, and a citizen of the Republic  
of China.

## IV.

That said applicant, Ho Ah Keau, arrived at the port of Honolulu on board the steamship "Siberia Maru" on the 7th day of December, 1921, and was held for examination before a board of special inquiry.

## V.

That thereafter, to wit, on the 9th day of December, 1921, a Board of Special Inquiry was duly convened, before which said Board of Special Inquiry a hearing was had to determine applicant's right to enter the United States, which said hearing was concluded on the 19th day of December, 1921. That after duly considering the evidence adduced at said hearing, a majority of said board found in favor of the admission of said applicant and one member of said board voted to deny the admission of said applicant, said dissenting member appealing from the decision of the majority of said board to the Secretary of Labor. That the action of said board as to the finding of the several members thereof and the noting of an appeal by the dissenting member from the decision of the majority, are as stated in paragraphs V and VI of said applicant's petition, which said paragraphs V and VI are hereby admitted.

## VI.

That the record of said hearing before said Board of Special Inquiry is attached to applicant's petition as alleged in paragraph VII thereof, which said [61] record is hereby, by reference, made a part of this return.

## VII.

That the Secretary of Labor of the United States, after duly considering said appeal, sustained the decision of the dissenting member of the Board of Special Inquiry and thereby determined and found that said Applicant, Ho Ah Keau, was not lawfully entitled to be admitted to the United States and further directed that said applicant be excluded from entering the United States; that a copy of the finding of said Secretary of Labor, together with a copy of the memorandum relating thereto, are hereto attached, marked Exhibits "A" and "B," respectively, and the same are hereby made a part of this return, together with a correction of said finding and order of said Secretary, dated March 6, 1922, and copy of memorandum in regard to said correction, dated March 6, 1922, both of which are hereto attached, marked Exhibits "C" and "D," respectively, and are hereby made a part of this return.

## VIII.

That the hearing and determination upon appeal by the Secretary of Labor was a full, fair and impartial hearing and determination, and conducted in all respects in the manner required by law.

## IX.

That respondent's custody of said applicant is for the purpose of preventing said applicant from entering the United States and for the purpose of deporting her to China, the country from whence she came, respondent's said custody being solely by reason of the finding and [62] order of the Board

of Special Inquiry, as herein alleged, and by reason of the finding and order of the Honorable Secretary of Labor upon appeal, as hereinbefore stated.

WHEREFORE, respondent prays that the writ of habeas corpus heretofore issued in this case, be dismissed at her costs.

(Sgd.) RICHARD L. HALSEY.

The United States of America,  
District of Hawaii,—ss.

Richard L. Halsey, being first duly sworn, according to law, deposes and says: That he is the Richard L. Halsey who has made the return to the writ of habeas corpus in the above-entitled cause; that he has read the said return and knows the contents thereof and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 7th day of April, A. D. 1922.

[Seal] (Sgd.) RITCHIE G. ROSA,  
Deputy Clerk, United States District Court, Territory of Hawaii. [63]

**Exhibit "A."**

55125/327

February 8, 1922.

In re HO SHEE, *alias* AH KEAU.

This case comes before the Board of Review on appeal.

Attorney Hott heard.

This is the case of a Chinese woman applying for admission to Hawaii on the ground that she is the wife of a Chinese resident there whose citizenship is conceded. The attorney in this case does not rep-



resent the applicant, but, on the other hand, represents one Hung Shee, a resident of Hawaii, whom he alleges is the lawful wife and, therefore, he urges that the present appeal be denied.

It appears that the alleged husband in this case is a very wealthy man, being reputed to be worth about \$750,000, and it is apparent there are some steps on foot to defeat the interest of the alleged legal wife, Hung Shee.

We will first consider the evidence tending to show that one Hung Shee is the lawful wife of the man in question, Lau Ah Leong, *alias* Lay Fut Leong. It appears that Hung Shee has had 13 or 14 children by Leong, 7 of whom are still living. The record shows that in 1910, when the man appeared as a witness, he testified that Hung Shee was his wife. Everything in the record points to the fact that she is his lawful wife. There is but one piece of evidence of this relationship missing, and that is the marriage certificate. It is easy to understand how a document of this nature pertaining to a ceremony celebrated approximately 35 years ago can be lost, and it is not believed the fact that this document cannot now be presented in evidence should serve as a bar to the claimed relationship. It is believed reasonable to hold that the fact this man has lived with her openly and notoriously for such a long period of time, that he has officially recognized her as his wife, and that she to all intents and purposes is his wife, raises a reasonable presumption that the marriage is valid.



Now, just a word in regard to the claim of the present applicant, Ho Shee. This woman claims to have married Leong about 1891 and that she went back to China January 13, 1910, and is at present returning from that trip. There are many discrepancies in the testimony of this woman; for instance Leong and Hung Shee testified that the real Ho Shee lived in the same house with Hung Shee from the time of her arrival in 1891 until the time she went to China in 1910. Leong and an alleged son of Ho Shee, who came on the same boat with applicant, testified that Ho Shee lived in the same house in China with Leong's third wife in 1910 until the time she came to Honolulu on the present trip. Regardless of this testimony, however, the applicant denies that she ever [64] lived in either of these houses. She likewise denies what has been very positively established, to wit, that Leong had any other wives or children by other wives.

The burden of proof naturally falls on the applicant in this class of cases. In regard to the alleged marital status of Hong Shee and Leong, it is noted that there are two adjudications against Leong for living in adultery with the real Ho Shee. On one occasion he has fined \$300, and on another occasion when he was arrested for living with Ho Shee he entered a plea of "*nolo contendere*" and was given a brief imprisonment and fined \$500 and costs.

This board is satisfied that the best evidence favors the recognition of the validity of the marriage between Hong Shee and Leong. It further believes

that the real Ho Shee is not identical with the present applicant.

It is RECOMMENDED that the appeal be denied.

ROBE CARL WHITE,  
Chairman, Board of Review.

ES/AVM.

So ordered:

E. J. HENNING,  
Assistant Secretary. [65]

**Exhibit "B."**

No. 55125/327.

February 4, 1922.

In re HO SHEE, *alias* AH LEAI.

**MEMORANDUM FOR THE ASSISTANT SECRETARY.**

The above-named Chinese woman is applying for admission to the United States of the wife of a citizen thereof, the citizenship of Lau Ah Leong, the alleged husband, being conceded. Two members of the board of special inquiry which handled the case at Honolulu have voted to admit, while one member has dissented, appealed from the majority opinion, and thereby caused the record to come before the Bureau and Department for review.

At the outset, it may be stated that the case has not been very satisfactorily handled at Honolulu, and the dissenting member of the board seems to be the only one who has not overlooked the fact that the burden of proof, in a matter of this kind, is by law, clearly upon the Chinese person applying for admission as one to whom the provisions of

the Chinese Exclusion Law do not apply. The Chairman of the board has increased his own difficulties by referring the case to the United States Attorney at Honolulu for his opinion upon the legal questions thought by the Chairman to be involved, and the sum total of the United States Attorney's opinion to the Chairman is that, if the Chairman and the board are satisfied that Ho Shee is the wife of the claimed husband, then she is entitled to admission, an opinion which is entirely correct, as far as it goes. In rendering his opinion, however, the United States Attorney has indulged in a lengthy discussion of the doctrine of presumptions, as applied to marriage laws and customs of the Territory of Hawaii, and has practically instructed the Chairman of the board that, under the conditions, the presumption of the legality of the marriage of the applicant to the claimed husband is to govern, because of the fact that when her marriage to the claimed husband took place, a regular license was shown to have been procured by the contracting parties; whereas, in the case of a former alleged wife, one Hung Shee, by name, proof is lacking that the necessary license was procured. It appears that the Hawaiian courts do not recognize common law marriages; that where a showing of a regular marriage is made and the parties have lived together and held themselves out to the public as man and wife, a presumption exists that the marriage was solemnized in accordance with the statutory requirements; but, that this presumption is overcome by the production of another party of

record or documentary evidence that a subsequent marriage was actually gone through and that all of the formalities were complied with. The United States Attorney's letter to the Chairman of the board was correct in setting forth that if the board was satisfied that Ho Shee were actually the legal wife of the claimed husband, admission [66] No. 55125/327.

should take place, a fact with which the Chairman was no doubt fully conversant, but he was not correct in holding that the board should be guided and governed by the doctrine of presumptions as applicable to marriages in Hawaii. It does not appear to the Bureau that it is necessary for the claimed wife, residing now in Honolulu, to present any evidence whatever to the Board that she is the legal wife of Lau Ah Leong. That is purely a collateral question. The question for the board to determine is whether or not the evidence presented by Ho Shee, considered in the light of all surrounding circumstances, favorable as well as unfavorable, establishes that she is the legal wife of a citizen of the United States. If it does, then she should be admitted; otherwise, she should be excluded. It is not for the board to decide which of the two women, if either, is the wife of the claimed husband, but simply whether the applicant has reasonably established her claims in that connection.

In weighing the evidence presented in behalf of the applicant it would have been, and was, quite competent for the board to consider the evidence submitted by other parties, tending to show that



the claimed husband had a wife living in the Hawaiian Islands. There is ample evidence in this record to show a clear possibility that the woman now living in Honolulu, and claiming to be the wife of Lau Ah Leong, actually is his wife, and this one circumstance, it seems to the Bureau, is sufficient to cast a substantial doubt upon the claims of the applicant.

In the person of the alleged husband of this applicant, the Government is quite clearly dealing with a Chinese who believes in the practice of concubinage, as known to the Chinese, if not in fact, as suggested by the dissenting member, in the practice of polygamy. The evidence shown that Lau Ah Leong has at various times cohabited with, and apparently held out to the public, two, three and perhaps four women, by all of whom he has had children. He has quire clearly violated every law and principle of decency as known to our system of Government, and is entitled to very little consideration or credence in connection with the issues to be determined in this proceeding. After holding out one Hung Shee to the public as his real legal wife for a period of time covering some thirty-eight years, he now appears and claims the present applicant, with whom he has concededly gone through a marriage ceremony, as his wife.

The record shows that about 1883 Lau Ah Leong was married to one Hung Shee, by whom he has had some fourteen children; and that in 1891 he married a person named Ah Keau, with whom the present applicant claims to be identical. At the



time this ceremony with Ah Keau was gone through, Hung She was still living in Honolulu, and Lau Ah Leong, apparently at the same time, held her out as his wife. There is also record evidence that he has upon occasions referred to Hung Shee as his first wife and Ho Shee as his second wife, plainly showing [67] that he has, in a No. 55125/327.

civilized community, openly and apparently notoriously, practiced concubinage, as known to the Chinese. He is now seemingly endeavoring to take advantage of the technicalities of American law to do what he could not do under the Chinese custom, which permits of the practice of concubinage, and substitute a second wife or concubine, for what, under the Chinese custom, would be the first and legal wife. There is ample reason for believing, however, that the first marriage *that* to Hung Shee was properly solemnized, and that the subsequent marriage to Ah Keau (applicant) was bigamous. The courts of Honolulu have themselves passed upon this feature and have imposed a fine and nominal jail sentence of three months upon Lau Ah Leong for his bigamous marriage to Ah Keau. In 1907 Lau Ah Leong pleaded guilty and paid a fine of three hundred dollars for unlawful cohabitation with Ho Shee (who applicant claims to be) and others. He at that time made no defense of marriage to Ho Shee. On March 21, 1910, a grand jury in the United States District Court for the District of Hawaii indicted Lau Ah Leong for bigamy, charging that on the 25th day of

October in the year 1886, he married Hung Shee, and did then and there have her for wife; and that Lau Ah Leong in 1908 did knowingly and unlawfully and feloniously marry and take as his wife one Ho Shee, otherwise called Ah Keau, the said Hung Shee being then and there living and in full life. Lau Ah Leong entered a plea of *nolo contendere*, was given a short imprisonment and fined \$500 and costs. It will be observed in this proceeding, as well as in the one in 1907, for unlawful cohabitation, he failed to make any defense, and did not bring in any proof of his alleged lawful marriage to Ah Keau in 1891, well knowing, apparently, that such marriage was bigamous, and would not help his case, and knowing also that under the conditions then existing, Hung Shee would probably not have as much difficulty in proving the strict compliance with the technical requirements as she would have a number of years later.

The Federal authorities, of course, are not bound by any such narrow rule in reaching a determination of the issues in this case as that attempted to be set down by the United States Attorney at Honolulu. The fact that the record abounds with evidence that Lau Ah Leong was married to another woman *lone* before he went through the ceremony in 1891 with Ah Keau, at which time the woman to whom he was first married was still living, is sufficient to cast a substantial doubt upon the fact of the legal marriage to Lau Ah Leong of Ah Keau, with whom the present applicant claims to be identical. That Ah Keau is not his wife is

shown by his own actions and testimony, covering a period of many years, during which he has always held out the other woman as his first wife, and has never declared Ah Keau to be his wife.

In addition to the reasons which exist for doubting that a person named Ah Keau is really the legal wife of Lau Ah Leong, there is also evidence in the present record which tends to indicate that the present applicant is [68] not identical with the No. 55125/327.

Ah Keau (Ho Shee) with whom Lau Ah Leong went through the ceremony in 1891. In the present case, Lau Ah Leong himself has testified that he has a third wife, one Wong Shee, living in China, and that Ho Shee, while in China lived in the same house with this third wife. The applicant, however, denies that she ever lived with the wife in China, and denies that her alleged husband ever had any other wives; although the evidence shows that Ho Shee, or Ah Keau, when in Honolulu, lived with the first wife and should have knowledge of her. She also claims to have no knowledge of the numerous children resulting from the cohabitation of Lau Ah Leong and Hung Shee, in Honolulu, and Wong Shee in China. This surprising lack of knowledge on the part of Ho Shee, as to the other marital ventures of her alleged husband, cast a substantial doubt upon her being identical with the woman who took part in the 1891 marriage and who departed for China in 1910. There are no photographs from which identification could be made.

The Bureau, after careful consideration, is of the opinion that the evidence in this record clearly fails to establish that Ho Shee, or Ah Keau, is of the classes exempt from the operation of the Chinese Exclusion Laws. She claims to be married to a citizen of the United States, but the evidence fails wholly to support her claim. The evidence fails to show that the ceremony between Ho Shee, or Ah Keau, and Lau Ah Leong in 1891 was valid, and incidentally, it fails to establish that the present applicant is identical with the female party to that apparently unlawful proceeding. It is settled law that the burden of proof in a case of this kind is upon the applicant; and that the decision of the administrative authorities, based upon some evidence, after fair hearing, is final. The District Court at Honolulu, before which this case may go on habeas corpus, and the Circuit Court for the Ninth Circuit, to which it may go on appeal, have affirmed these fundamental principles, so often that it is unnecessary to cite decisions. In this case, the hearing has been fair in every respect, and there is ample evidence to justify the conclusion that the status of the applicant has not been established. The Bureau, being of the opinion that the burden of proof has not been sustained, recommends that the appeal of the dissenting mem-



ber be sustained, and that the applicant's request for admission to the United States be denied.

For the Commissioner-General:

---

Special Assistant.

CEB.

Ralston & Hott.

Oral Hearing Requested. [69]

**Exhibit "C."**

55125/327

March 6, 1922.

In re HO SHEE.

CONSIDERED AND RECOMMENDED that the previous decision be amended so as to provide that the appeal of the dissenting member of the Board of Special Inquiry be sustained and the exclusion of the alien directed.

ROBE CARL WHITE,  
Chairman Board of Review.

ES/JMC.

So ordered:

E. J. HENNING,  
Assistant Secretary. [70]

**Exhibit "D."**

No. 55125/327.

March 6, 1922.

In re HO SHEE.

MEMORANDUM FOR THE ASSISTANT SECRETARY.

The case of the above-named Chinese woman was before the Department some time ago, on appeal from the Honolulu office, two members of the board



of special inquiry having voted to admit, and one having dissented and appealed from the admitting decision of the other two.

The Bureau, in sending out the Department's decision, advised the Inspector-in-charge at Honolulu that the appeal "has been dismissed," which, given its true meaning, would mean that the appeal of the dissenting member had been dismissed, thereby resulting in the decision of the majority, to admit, being sustained. This was an unfortunate and erroneous use of words, and was caused, no doubt, by the fact that, ordinarily, in sending out a decision to deposit, the word "Dismissed" is used. Under date of February 14, 1922, the Bureau wrote an explanatory letter to the Inspector-in-charge at Honolulu, setting forth that, in fact, the appeal of the dissenting member had been sustained, and exclusion of the applicant, Ho Shee, directed.

The Inspector-in-charge at Honolulu has now invited attention to the fact that the Board of Review, in preparing its recommendation for the Department, used the words, "It is recommended that the appeal be denied," this leading to the same result as that which might have been caused by the use of the word "Dismissed" by the Bureau, as set forth in the second paragraph hereof.

As the Bureau recalls the matter, the recommendation of the Board of Review, was "that the appeal be denied and deportation proceeded with." The "appeal be denied" are inconsistent with "and deportation proceeded with," the former, in effect, being tantamount to direction of admission of the

applicant, while the latter, direct deportation. As the Bureau recalls this matter, it was the view of all officers who handled the case, that the right of appellant to enter had not been established, and it would therefore appear that the words "and deportation proceeded with" (if they were used, as the Bureau believes) were simply used to make the recommendation clear, and thereby avoid such a situation as has now arisen.

The Bureau recommends that the decision be amended (if, as the Bureau believes, it was the intention to exclude Ho Shee) to read "that the appeal of the dissenting member of the board of special inquiry be sustained, and exclusion of the applicant, Ho Shee, directed."

I. F. DIXON,

Assistant Commissioner-General.

CEB. [71]

---

In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho She, for a Writ of Habeas Corpus. Filed April 20, 1922. (Sgd.) Ritchie G. Rosa, Deputy. Demurrer of Petitioner to Return of Richard L. Halsey to Writ of Habeas Corpus. Harry Irwin, J. Lightfoot, Attorneys for Petitioner. [72]

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU,  
Otherwise Known as HO SHE, for a Writ  
of Habeas Corpus.

**Demurrer of Petitioner to Return of Richard L.  
Halsey to Writ of Habeas Corpus.**

Now comes Ho Ah Keau, otherwise known as Ho She, and demurs to the return of Richard L. Halsey, Esquire, to the writ of habeas corpus issued in the above-entitled court and cause, says:

That said return to said Writ of Habeas Corpus does not show any lawful reason why the said Richard L. Halsey, Esquire, United States Immigration Inspector-at-Large, at the port of Honolulu, should imprison, restrain or deprive her of her liberty the said Ho Ah Keau, otherwise known as Ho She.

WHEREFORE, petitioner prays that said writ of habeas corpus be made perpetual, and that petitioner be discharged thereof.

Dated Honolulu, T. H., April 20, 1922.

HO AH KEAU,

Otherwise Known as HO SHE.

By (Sgd.) J. LIGHTFOOT,

Her Attorney.

Receipt of the copy of the foregoing demurrer is hereby acknowledged this 20th day of April, 1922.

(Sgd.) S. C. HUBER,

United States Attorney. [73]

In the United States District Court for the District and Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Opinion. Filed Aug. 10, 1922. (Sgd.) Wm. L. Rosa, Clerk. Harry Irwin, J. Lightfoot, Attorneys for Petitioner. S. C. Huber, Norman D. Godbold, for Respondent. Messrs. Thompson, Catheart and Ulrich, also filed Brief in opposition to Writ. J. B. Poindexter, Judge. [74]

### Opinion.

Upon the filing of the petition for a writ of habeas corpus, the usual order to show cause was issued and a return thereto was made and a hearing had. Upon this hearing the writ was issued and petitioner released on bond pending the final determination of the matter. A return to the writ was made, to which return petitioner demurs on the ground that the return shows no lawful reason why respondent should deprive said petitioner of her liberty. The evidence taken by the Board of Special Inquiry at Honolulu and the proceedings in the Department of Labor are made a part of the return. The essential facts are not in dispute, the only difficulty is in the application of the law to the facts. The facts are these:

On December 7, 1921, the petitioner, Ho Ah Keau, also known as Ah Keau and Ho Shee, a Chinese person, arrived at the port of Honolulu, claiming admission to the United States as the lawful wife of L. Ah Leong, admittedly a citizen of the United



States and a resident of Honolulu. At the hearing before the Board of Special Inquiry it appeared that petitioner first came to Honolulu in 1891, and a few days after her arrival, May 25, 1891, she was married to L. Ah Leong in accordance with the laws of Hawaii as appears from a certificate of marriage and the records in the office of the Board of Health of this Territory.

About the year 1883, there arrived in Honolulu one Hung Shee, also known as Hung Dai Kim and Fung Dai Kim [75] Ah Leong, and shortly after her arrival she began to live with said L. Ah Leong as his wife. It does not appear that any marriage license was procured or that any marriage ceremony was performed, as was then and is now required by the laws of Hawaii, although Hung Shee testifies that there was a wedding feast at the time.

Children by L. Ah Leong were born to both women in Hawaii, many of whom are now living; two, and possibly four, of the children of Hung Shee being born prior to the marriage of L. Ah Leong and Ho Shee. It is evident that at various times L. Ah Leong claimed each of these women as his wife.

Ho Shee, the name by which she appears to be commonly known, departed from the United States for China, as she claims and as appeared from the steamship records of this port, on January 13, 1910, on the S. S. "Korea," accompanied by several of her children, including Lai Chang, then an infant in arms. This boy returned with petitioner, Ho Shee, December 21, 1921, and was admitted as



Hawaiian born, the son of Ho Shee and L. Ah Leong.

Evidence was produced before the Board that in the year 1907, said L. Ah Leong was charged by the Grand Jury in the United States District Court for this Territory, with the crime of unlawful cohabitation with both Ho Shee and Hung Shee (in the indictment called Dai Kim), and another woman. To the indictment he entered a plea of guilty, and paid a fine.

In the same court, in the year 1910, he was [76] indicted for the crime of bigamy, the indictment charging that he did, in the year 1886, marry said Hung Shee, and did afterwards marry said Ho Shee. To this indictment he entered a plea of "*nolo contendere*," and was sentenced to one hour in jail and to pay a fine of \$500.

There were also presented to the Board copies of deeds executed in 1918, and since, signed by L. Ah Leong and Hung Shee, described as his wife.

Hung Shee made a trip to China in 1907 and returned to Honolulu in 1910, and upon her return L. Ah Leong claimed that she was his wife, and she was admitted as such at that time.

Ho Shee, the petitioner, was identified by every witness who testified before the Board of Special Inquiry as the original Ah Keau. She also presented a certificate of identity or affidavit from the American Consul at Hongkong. Hung Shee, opposing petitioner's entry, caused to be filed with the board a copy of a complaint in divorce, filed in the Circuit Court of this Territory, wherein she seeks

a divorce from L. Ah Leong, and in which complaint said L. Ah Leong, among other charges, is accused of having lived in adultery with Ho Shee for twenty-nine years; also copy of an affidavit filed in the same court stating that said Ho Shee had just arrived in Honolulu and was seeking to enter as the wife of L. Ah Leong.

Upon the completion of the hearing before the Board of Special Inquiry, two of the members of the board voted to admit the petitioner to the United States as the lawful wife of a citizen, but the third member voted against [77] admission on the ground that she was a person who believed in, and who had practiced polygamy. The dissenting member of the board appealed from the decision of the board to the Secretary of Labor, who ordered that said Ho Shee be denied admission on the ground that she was not the lawful wife of L. Ah Leong, and on the further ground that petitioner was not the identical Ah Keau who had entered into the marriage with said L. Ah Leong in 1891. It is conceded that if petitioner is the lawful wife of L. Ah Leong, she is entitled to admission to the United States.

It is urged in this court that if the hearing before the Secretary of Labor was fair and impartial, his findings are conclusive, and that the court has no power to set them aside. The case of an unfair hearing, however, is not the only one in which the courts may annul a finding by an executive department of the Government. In the case of Ng Fung

Ho et al. vs. White, decided May 29, 1922, the Supreme Court lays down the rule in this language:

“For where there is jurisdiction, a finding of fact by the executive department is conclusive, U. S. vs. Ju Toy, 198 U. S. 253; and the courts have no power to interfere unless there was either denial of fair hearing, Chin Yow vs. U. S., 208 U. S. 8, or the finding was not supported by evidence, American School of Magnetic Healing vs. McAnnully, 187 U. S. 94, or there was an application of an erroneous rule of law, Gegiow v. Uhl, 239 U. S. 3.”

The petitioner, through counsel, argues that the hearing before the Secretary was unfair, insisting that certain documents were before him that were not introduced in evidence before the Board of Special Inquiry. A careful [78] examination of the record in the case leads me to consider that all documentary evidence considered by the Secretary or the Immigration Department was before the Board of Special Inquiry at the time of the hearing in Honolulu. The hearing cannot be held unfair on this ground.

It is also contended that the Assistant Secretary's decision, that petitioner is not the lawful wife of L. Ah Leong, is contrary to law, and his finding that petitioner is not the original Ho Shee is not supported by evidence.

Is Ho Shee, the petitioner, the lawful wife of L. Ah Leong? The argument advanced against the legality of this marriage is, that at the time of the performance of the ceremony, L. Ah Leong had a

wife living, and therefore was not competent to enter into the marriage relation with another woman. I will assume that L. Ah Leong's relations with Hung Shee prior to 1891, were sufficient to constitute what is commonly called a "common-law" marriage and that these relations existed at the time of his marriage to Ho Shee in 1891. It is argued that if these people were living together as man and wife and holding themselves out as such, a presumption arises that they were legally competent to enter into the marriage relation, and that they had complied with all the requirements of the law necessary to make a valid marriage contract. That such a presumption, under such circumstances, does arise is undoubtedly true, and such presumption continues in the absence of any counter presumption or showing that would repel such conclusions. Bishop Mar., Div. & Sep., p. 932; Estate Kalamau, 26th Haw., [79] 81. This presumption, however, does not arise where there was such cohabitation by one person with two others at the same time, as the testimony shows that L. Ah Leong was doing much of the time. Nor does the presumption of a valid marriage arise where, while three persons are living, two of them cohabit matrimonially, then separate, and one of them and a third do the same, no more being proved. Bishop, Mar., Div. & Sep., p. 1027-28.

I think it true, also, that the presumption of a valid marriage, arising from reputation and cohabitation, is overcome by the showing of a second marriage duly solemnized as required by law. Case vs.



Case, 17 Cal. 598; McKibbin vs. McKibbin, 139 Cal. 448; 73 Pac. 143; Clayton vs. Wardell, 4 N. Y. 230; Jones vs. Jones, 48 Md. 391; 30 Am. Rep. 466; Norman vs. Goode, 38 S. E. 317 (Ga.); Parsons vs. Grand Lodge, 78 N. W. 676 (Iowa); Pettinger vs. Pettinger, 89 Am. St. Rep. 193; In re Sloan Estate, 69 Pac. 624. While I do not agree with counsel opposing the writ, that presumptions arising from evidence cannot be indulged in by executive officers in considering evidence, and that such presumptions must be confined to "law trials," it seems unnecessary, in view of the evidence here, to resort to presumptions, as the very evidence which shows the inception of the so-called "common-law" marriage between Hung Shee and L. Ah Leong also shows that no marriage license was procured, and that other requirements of the statutes of Hawaii were not complied with. Estate Kalamau, *supra*. But two witnesses testified to the facts and circumstances surrounding the beginning of this relation. Hung Shee at the hearing, [80] when asked if a license had been issued for their marriage, said, "I do not know," but it was shown that on her return from a trip to China in 1910, she testified, when seeking admission, there was no license. L. Ah Leong throughout the hearing seems to have insisted that none of the legal requirements regarding marriage was complied with. In fact, he testified that she refused to marry him and that he paid her wages, as a hired servant, all the time she lived with him. Records of the Board of Health fail to show that a license was issued for such marriage, or



a ceremony performed, as was disclosed by a search of such records by a member of the Board of Special Inquiry. Hung Shee in testifying mentioned a "certificate," but it developed that she referred to the written consent, in the Chinese language, of her mother to her marriage to any man she might choose, which was given to her before she left China. I think it clear that these people entered into this relation following Chinese custom, without procuring the necessary license or resorting to any other formality required by the laws of Hawaii relating to marriage.

The petitioner, by the proof of her marriage to L. Ah Leong in 1891, in full compliance with the laws of Hawaii, made out a *prima facie* case. Was this *prima facie* case overcome by proof of a prior marriage by reputation—a "common-law" marriage? "The burden of proof in such a case is not on the party asserting the validity of the second marriage but on the other who asserts its invalidity on account of the validity of the first." *Patterson vs. Gaines*, 47 U. S., 596. [81]

This leads to the question, Is a so-called "common-law" marriage valid in Hawaii? I will not go into an extended discussion of the proposition. The Supreme Court of Hawaii, in a carefully considered opinion in *Parke vs. Parke*, 25th Haw., 397, construing the law in force in Hawaii in 1883, and since, held that a marriage license is a prerequisite to a valid marriage in Hawaii, and that "common-law" marriages, so called, are void in this jurisdiction, expressly overruling *Godfrey vs. Rowland*,

16th Haw., 377, a former decision to the contrary. But it is contended that the decisions of the Supreme Court of Hawaii are not necessarily binding on this court. I concede the point, but it must not be forgotten that such matters as marriage and divorce are matters wholly of local concern, to be determined by local laws, and the construction of such laws by local courts, is of great, if not controlling, weight. *Sweeney vs. Lomme*, 22 Wall, 208; *N. P. R. Co. vs. Hambly*, 154 U. S., 349; *Copper Green M. Co. vs. Arizona Board*, 206 U. S., 479; *Lewis vs. Herrera*, 208 U. S. 309; *Santa Fe Co. vs. Coler*, 215 U. S. 307; *Phoenix Ry. Co. vs. Landis*, 231 U. S. 579; *Work vs. United Globe Mines*, 231 U. S. 599; *Whitmer vs. El Paso & S. W. Co.*, 201 F. 193.

In view of these authorities, I am constrained to follow the Territorial Supreme Court in its construction of the laws of Hawaii as applied to marriage. It might be added that it would be unfortunate, indeed, if, in this jurisdiction, the Federal Court were to hold "common-law" marriages valid, while the Territorial Courts took an opposite view. Great confusion in marital and property rights would [82] follow such a situation, and the evil resulting therefrom would be of such grave character as might well deter this court, in a doubtful case, from making a contrary decision.

Applying, then, the principles laid down in *Parke vs. Parke*, *supra*, it is evident that the so-called marriage between L. Ah Leong and Hung She was void, and in 1891 he was competent, under the law,

to enter into marriage with another woman. This he did in a legal way, complying with all the requirements of the law, in the marriage with Ho Shee. I therefore conclude that a valid marriage was entered into between Ho Shee and L. Ah Leong on May 25, 1891, and that Ho Shee is now the lawful wife of L. Ah Leong; and that the Assistant Secretary of Labor applied an erroneous principle of law in holding so-called "common-law" marriages valid in Hawaii.

The fact that L. Ah Leong entered a plea of guilty to the charge of bigamy in marrying Ho Shee, or that at times he held Hung Shee out to the world as his wife after 1891, can in no wise affect Ho Shee's status as his wife. She became his lawful wife in 1891, and thereafter that status could only be changed by death or the judgment of a competent court, dissolving the marriage. Neither event has happened. And the motives, whatever they may have been, that influenced L. Ah Leong in his attitude towards Ho Shee since their marriage, causing him to hold out some other woman as his wife, are immaterial. His action cannot change the law nor should it be considered as affecting her right to enter the United States. She is claiming admission [83] in her own right, as the wife of a citizen, and as such she is entitled to admission. His adulterous conduct cannot be permitted to militate against her.

Is the petitioner the identical Ah Keau who was a party to the marriage of May 25, 1891? It is insisted that the evidence raises a question of fact

and that the finding of the Department that she is not, is conclusive. As heretofore stated, every witness who testified before the Board of Special Inquiry identified the petitioner as being the original Ah Keau, and there is not one scintilla of evidence, so far as I have been able to discover, on which to base a contrary finding. During the examination of the petitioner, she testified that she did not know Hung She and refused to identify her, and there were other discrepancies between her testimony and the testimony of other witnesses. Because of these discrepancies in the testimony, the Assistant Secretary concluded that she could not be the real Ah Keau who entered into the marriage relation with L. Ah Leong, but in reaching this conclusion, he must have disbelieved all the other witnesses, as well as Ho Shee, insofar as they testified to her identity; also the records in the case which bear upon the same proposition, and have given credence to the statements of Ho Shee that she did not know Hung Shee and had never lived in the same house with her in Hawaii. Yet these statements of Ho Shee do not prove, or tend to prove, that she had never been in Hawaii or that she was an imposter, and a finding of fact cannot be based thereon alone. It is evident that she was deliberately false in her testimony in these regards or was suffering [84] from an unusual lapse of memory. These discrepancies in the testimony were sufficient to have warranted the Secretary in rejecting Ho Shee's testimony, but with her testimony rejected, there remains ample evidence to identify



her as the original Ah Keau; and there is none to the contrary, whether her testimony is believed or not. In fact, the Department acted upon the theory that she is the original Ah Keau when it admitted the boy, Lai Chang, as Hawaiian born, who accompanied petitioner and was seeking admission at the same time, and whose right to admission was determined in the same proceeding. The evidence is conclusive, if believed at all, that he was the son of petitioner and L. Ah Leong, and that he was born in Hawaii. If petitioner is the mother of Lai Chang who was born in Hawaii, and the mother of Lai Chang is the original Ah Keau, all of which facts the Department necessarily found when it admitted Lai Chang, I cannot understand how the Department, when it came to pass upon petitioner's right to enter, could decide that she is not the original Ah Keau. The finding of the Assistant Secretary that petitioner is not the original Ah Keau is a finding of fact not supported by any evidence in the case. If, by any theory, her testimony adverted to above could be construed as evidence tending to prove her an imposter, then it might well be said that as such, in this matter, it is legally insufficient to prove the fact.

The dissenting member of the Board of Special Inquiry held that Ho Shee was a person who believed in and who had practiced polygamy, basing that finding upon the fact that she had lived with L. Ah Leong knowing that he was [85] living at the same time in concubinage with other women.



Petitioner testified directly that she does not believe in polygamy. If she was the lawful wife of L. Ah Leong, she was not living in polygamy with him even though she may have had knowledge of his reprehensible conduct. I, therefore, conclude that the finding of the dissenting member of the Board is not supported by evidence.

The demurrer to the return is sustained.

(Sgd.) J. B. POINDEXTER,  
Judge, United States District Court, Territory of  
Hawaii.

Dated at Honolulu, Territory of Hawaii, this 10th  
day of August, A. D. 1922. [86]

---

In the United States District Court in and for  
the Territory of Hawaii. No. 174. In the Matter  
of the Application of Ho Ah Keau, Otherwise  
Known as Ho Shee, for a Writ of Habeas Corpus.  
Motion for Leave to File Amended Return. Filed  
Sept. 28, 1922, at 3 o'clock and 50 Minutes P. M.  
Wm. L. Rosa, Clerk. By (Sgd.) Wm. F. Thompson,  
Jr., Deputy Clerk.

Receipt of a copy of the within motion is ad-  
mitted this 28th day of September, 1922.

(Sgd.) J. LIGHTFOOT,  
Attorney for Petitioner. [87]

In the United States District Court in and for the  
Territory of Hawaii.

No. 174.

In the Matter of the Application of HO AH KEAU,  
Otherwise Known as HO SHEE, for a Writ  
of Habeas Corpus.

**Motion for Leave to File Amended Return.**

Comes now Richard L. Halsey, respondent herein, and shows to this Honorable Court that on, to wit, the 1st day of March, 1922, the applicant above named filed her petition for writ of habeas corpus in the above-entitled cause; that subsequently on, to wit, said 1st day of March, 1922, Honorable J. B. Poindexter, Judge of this Honorable Court, issued an order to show cause to respondent requiring respondent to appear upon a day therein set forth and show cause why a writ of habeas corpus should not issue as prayed for in said position; that on, to wit, the 4th day of March, 1922, your respondent filed his return to said order to show cause; that on, to wit, the 6th day of March, 1922, petitioner filed her demurrer to the return of respondent to said order to show cause; that on, to wit, the 6th day of March, 1922, this Honorable Court made its order overruling said demurrer *pro forma* and ordered that a writ of habeas corpus issue herein and further ordered that under said writ the said petitioner be released on bail pending the final determination of this cause; that on, to wit, the 7th day of April, 1922,

respondent herein filed his return to said writ [88] of habeas corpus which said return did not include as a part thereof either the original or a full and correct copy of all of the proceedings, documents and written evidence had and considered before and by the Board of Special Inquiry convened at Honolulu, December 9th, 1921, and the Secretary of Labor of the United States upon the appeal taken from the action of said Board of Special Inquiry there not being included therein either actually or by reference certain exhibits and other matters of evidential value considered by said Board of Special Inquiry and said Secretary of Labor; that on, to wit, the 20th day of April, 1922, petitioner filed her demurrer to the return of respondent to said writ of habeas corpus; that on, to wit, the 10th day of August, 1922, this Honorable Court filed its opinion sustaining the demurrer of petitioner to the return of respondent to said writ of habeas corpus.

That your respondent desires to file an amended return to said writ of habeas corpus.

Wherefore, your respondent moves this Honorable Court for leave to file his amended return a copy of which is hereby attached, marked Exhibit "B," hereby specifically referred to, incorporated herein and made a part hereof.

This motion is based on all the files, records and proceedings in the above-entitled cause and the affidavit of William T. Carden, United States Attorney for the District of Hawaii, attorney for respondent herein, hereto attached marked Ex-

hibit "A" hereby specifically referred to, incorporated herein and made a part hereof.

Dated at Honolulu, 28th day of September, 1922.

RICHARD L. HALSEY,

Respondent Above Named.

By (Sgd.) WILLIAM T. CARDEN,

United States Attorney for the District of Hawaii.

[89]

**Exhibit "A."**

In the United States District Court in and for  
the Territory of Hawaii.

No. 174.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Affidavit of William T. Carden.**

United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

William T. Carden, being first duly sworn, on oath deposes and says that he is the United States Attorney for the District of Hawaii and as such appears for Richard L. Halsey, respondent in the above-entitled proceedings; that he has examined the files, records and proceedings in the above-entitled cause and that the return of respondent to the writ of habeas corpus heretofore filed herein does not completely set forth the record and proceedings and evidence considered by the Board of

Special Inquiry and the Secretary of Labor of the United States of America on appeal from said Board of Special Inquiry in the above-entitled cause.

And further affiant saith not.

Dated at Honolulu, this 28th day of September, 1922.

(Sgd.) WILLIAM T. CARDEN,  
United States Attorney for the District of Hawaii.

Subscribed and sworn to before me this 28th day of September, 1922.

[Seal] (Sgd.) WM. L. ROSA,  
Clerk, United States District Court, Territory of  
Hawaii. [90]

---

In the United States District Court in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Stipulation. Filed Sept. 28, 1922, at 3 o'clock and 50 Minutes P. M. Wm. L. Rosa, Clerk. By (Sgd.) Wm. F. Thompson, Jr., Deputy Clerk. [91]

In the United States District Court in and for the  
Territory of Hawaii.

In the Matter of the Application of HO AH KEAU,  
Otherwise Known as HO SHEE for a Writ of  
Habeas Corpus.



**Stipulation Re Filing Record of Proceedings Before  
Board of Special Inquiry and Secretary of  
Labor of United States.**

IT IS HEREBY STIPULATED AND AGREED by and between the petitioner and the respondent herein by their respective counsel that the respondent, Richard L. Halsey, file the original record of the proceedings and all documentary evidence and matters before the Board of Special Inquiry and before the Secretary of Labor of the United States and incorporate the same by reference in his return in lieu of attaching a copy thereof to his said return.

Dated at Honolulu, this 28th day of September, 1922.

HO AH KEAU,  
Otherwise Known as HO SHEE,  
Petitioner,  
By (Sgd.) J. LIGHTFOOT,  
Her Attorney.  
RICHARD L. HALSEY,  
Respondent.

By (Sgd.) WILLIAM T. CARDEN,  
United States Attorney for the District of Hawaii. [92]

---

In the United States District Court in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Amended

Return of Richard L. Halsey, Respondent, to Writ of Habeas Corpus. Filed October 4, 1922, at 2 o'clock and — Minutes P. M. Wm. L. Rosa, Clerk. By (Sgd.) Wm. F. Thompson, Jr., Deputy Clerk. William T. Carden, United States Attorney, Harry Steiner, Assistant United States Attorney, Attorneys for Respondent.

Due and legal service of the within amended return to writ of habeas corpus is hereby accepted and receipt of a copy thereof acknowledged this 4 day of October, A. D. 1922.

(Sgd.) J. LIGHTFOOT,  
Attorney for Petitioner, [93]

In the United States District Court in and for the  
Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Amended Return of Richard L. Halsey, Respondent,  
to Writ of Habeas Corpus.**

To the Honorable JOSEPH B. POINDEXTER,  
Judge of the United States District Court, for  
the District of Hawaii:

Comes now Richard L. Halsey, respondent herein, and hereby makes the following amended return to the writ of habeas corpus issued in the above-entitled matter:

I.

The respondent is now, and for more than five

years last past has been, United States Immigration Inspector-in-charge at the port of Honolulu, T. H.

## II.

That he denies each and every paragraph and allegation contained in petitioner's application for writ of habeas corpus, filed herein, except as hereinafter admitted or otherwise denied.

## III.

That applicant, Ho Ah Keau, otherwise known as Ho Shee (hereinafter referred to as Ho Ah Keau), is an alien, a Chinese, and a citizen of the Republic of China. [94]

## IV.

That said applicant, Ho Ah Keau, arrived at the port of Honolulu on board the steamship "Siberia Maru" on the 7th day of December, 1921, and was held for examination before a Board of Special Inquiry.

## V.

That thereafter, to wit, on the 9th day of December, 1921, a Board of Special Inquiry was duly convened, before which said Board of Special Inquiry a hearing was had to determine applicant's right to enter the United States, which said hearing was concluded on the 19th day of December, 1921. That after duly considering the evidence adduced at said hearing, a majority of said board found in favor of the admission of said applicant and one member of said board voted to deny the admission of said applicant, said dissenting member appealing from the decision of the majority of said board to the Secretary of Labor. That the action of said

board as to the finding of the several members thereof and the noting of an appeal by the dissenting member from the decision of the majority, are as stated in paragraphs V and VI of said applicant's petition, which said paragraphs V and VI are hereby admitted.

VI.

That the Secretary of Labor of the United States after duly considering said appeal sustained the appeal of the dissenting member of the Board of Special Inquiry and determined and found that said applicant, Ho Ah Keau, was not lawfully entitled to be admitted to the United States and further directed that said applicant be excluded from entering the United States.

VII.

That the original record of the proceedings and all documentary [95] evidence and matters before the Board of Special Inquiry and before the Secretary of Labor of the United States on said appeal is filed herewith marked, to wit, enclosure No. 5674 from the Department of Labor, Bureau of Immigration, and enclosure No. 1742 from the Department of Labor, Bureau of Immigration, both of which said documents are hereby specifically referred to, incorporated herein and made a part of this return.

VIII.

That the hearing had and held before the Board of Special Inquiry was a full, fair and impartial hearing.

## IX.

That the hearing and determination upon appeal by the Secretary of Labor was a full, fair and impartial hearing and determination and conducted in all respects in the manner required by law.

## X.

That respondent's custody of said applicant is for the purpose of preventing said applicant from entering the United States and for the purpose of deporting her to China, the country from whence she came, respondent's said custody being solely by reason of the finding and order of the Board of Special Inquiry, as herein alleged, and by reason of the finding and order of the Honorable Secretary of Labor upon appeal, as hereinbefore stated.

WHEREFORE, respondent prays that the writ of habeas corpus heretofore issued in this case, be dismissed at her cost.

(Sgd.) RICHARD L. HALSEY.

Dated at Honolulu, T. H. this 28th day of September, 1922. [96]

The United States of America,  
District of Hawaii,—ss.

Richard L. Halsey, being first duly sworn, according to law, deposes and says: That he is the Richard L. Halsey who has made the amended return to the writ of habeas corpus in the above-entitled cause; that he has read the said amended return and knows the contents thereof and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.



Subscribed and sworn to before me this 28th day of September, A. D. 1922.

(Sgd.) WM. F. THOMPSON, Jr.,  
Deputy Clerk, United States District Court, Ter-  
ritory of Hawaii. [97]

---

In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Demurrer of Petitioner to Amend Return of Richard L. Halsey, Respondent, to Writ of Habeas Corpus. Filed October 4th, 1922, at 2 o'clock and ——— Minutes P. M. Wm. L. Rosa, Clerk. By (Sgd.) Wm. F. Thompson, Jr., Deputy Clerk. J. Lightfoot, Attorney for Petitioner, 4-5-6 McIntyre Building, Honolulu, T. H. [98]

In the District Court of the United States in and for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU, Otherwise Known as HO SHEE, for a Writ of Habeas Corpus.

**Demurrer of Petitioner to Amended Return of Richard L. Halsey, Respondent, to Writ of Habeas Corpus.**

Now comes Ho Ah Keau, otherwise known as Ho Shee, petitioner herein, by her attorney, J. Lightfoot, and demurs to the amended return of Richard L. Halsey, respondent herein, to the writ

of habeas corpus issued herein, and for cause of demurrer says:

That said amended return of said writ of habeas corpus does not show any lawful reason why the said Richard L. Halsey, United States Immigration Inspector-in-charge, respondent herein, should imprison, restrain, or deprive her, the said Ho Ah Keau, otherwise known as Ho Shee, of her liberty.

WHEREFORE, said petitioner prays that said writ of habeas corpus be made perpetual, and that judgment be entered granting the prayer of said petition.

Dated at Honolulu, this 4th day of October, A. D. 1922.

HO AH KEAU,  
Otherwise Known as HO SHEE.

By (Sgd.) J. LIGHTFOOT,

Her Attorney.

Receipt of a copy of the foregoing Demurrer is hereby acknowledged, this 4th day of October, A. D. 1922.

(Sgd.) WILLIAM T. CARDEN,  
United States District Attorney. [99]

---

In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Judgment. Filed October 4th, 1922, at 2 o'clock and ——— Minutes P. M. Wm. L. Rosa, Clerk. By (Sgd.) Wm. F. Thompson, Jr., Deputy Clerk. J.

Lightfoot, Attorney for Petitioner, 4-5-6 McIntyre Building, Honolulu, T. H. [100]

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Judgment.**

And now on this 4th day of October, A. D. 1922, coming on for hearing before me, the above-entitled cause, J. Lightfoot, Esquire, appearing for petitioner, and William T. Carden, Esquire, United States Attorney for the District of Hawaii, appearing for respondent, and the said respondent having filed in said cause an amended return to the writ of habeas corpus, heretofore issued herein, and the said petitioner having demurred thereto;

And it appearing to the Court that the matters and things set forth in said amended return have been passed upon and decided in this court in the opinion made and filed herein on the 11th day of August, A. D. 1922, said demurrer to said amended return having been sustained,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that the temporary writ of habeas corpus, heretofore issued herein, be made perpetual, and that Ho Ah Keau, otherwise known as Ho Shee, be and she is hereby enlarged, set at liberty and relieved from the unlawful detention, confinement and imprisonment, referred to in her said petition.

Done in open court this 4th day of October, A. D. 1922.

(Sgd.) J. B. POINDEXTER,  
Judge of Said Court.

Receipt of a copy of the foregoing judgment is hereby acknowledged, this 4th day of October, A. D. 1922.

(Sgd.) WILLIAM T. CARDEN,  
United States District Attorney. [101]

---

In the United States District Court in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Stipulation. Filed December 30, 1922, at 11 o'clock and 50 Minutes A. M. Wm. L. Rosa, Clerk. By (Sgd.) Wm. F. Thompson, Jr., Deputy Clerk. William T. Carden, United States Attorney, Fred Patterson, Assistant U. S. Attorney, Harry Steiner, Assistant U. S. Attorney. [102]

In the United States District Court in and for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU, Otherwise Known as HO SHEE, for a Writ of Habeas Corpus.

**Stipulation Extending Time to and Including February 5, 1923, for Perfecting Appeal.**

IT IS HEREBY STIPULATED AND AGREED by and between the petitioner and the

respondent herein by their respective counsel that the respondent, Richard L. Halsey, have up to and including the 5th day of February, 1923, within which time to perfect the appeal heretofore noted by him in the above-entitled cause.

Dated at Honolulu, T. H., this 30th day of December, 1922.

HO AH KEAU,  
Otherwise Known as HO SHEE,  
Petitioner,

By (Sgd.) J. LIGHTFOOT,  
Her Attorney.

RICHARD L. HALSEY,  
Respondent.

By (Sgd.) WILLIAM T. CARDEN,  
United States Attorney for the District of Hawaii,  
His Attorney. [103]

---

In the United States District Court in and for  
the Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Stipulation Extending Time to and Including Feb-  
ruary 25, 1923, for Perfecting Appeal.**

IT IS HEREBY STIPULATED AND  
AGREED by and between the petitioner and the  
respondent herein by their respective counsel that  
the respondent, Richard L. Halsey, have up to and  
including the 25th day of February, 1923, within



which time to perfect the appeal heretofore noted by him in the above-entitled cause.

Dated at Honolulu, T. H., this 2d day of February, 1923.

HO AH KEAU,  
Otherwise Known as HO SHEE,  
Petitioner.  
By (Sgd.) HARRY IRWIN,  
Her Attorney.  
RICHARD L. HALSEY,  
Respondent,  
By (Sgd.) WILLIAM T. CARDEN,  
United States Attorney for the District of Hawaii,  
His Attorney.

Filed Feby. 2/23. (Sgd.) Wm. L. Rosa, Clerk.  
[104]

---

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Petition for an Allowance of Appeal.**

To the Honorable J. B. POINDEXTER, District  
Judge, Presiding:

Richard L. Halsey, Inspector-in-Charge of Immigration at the Port of Honolulu, respondent herein, conceiving himself aggrieved by the decision and judgment made and entered herein on respectively the 10th day of August, and the 4th day of October, 1922, sustaining the demurrer to

the return and amended return to the writ of habeas corpus herein, and adjudging that said writ of habeas corpus be made perpetual and that Ho Ah Keau, otherwise known as Ho Shee, be enlarged, set at liberty and relieved from the detention, confinement and imprisonment referred to in her said petition, and a Department of the United States Government having directed an appeal to be taken herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the said decision and judgment for the reasons specified in the assignment of errors hereto attached, and he prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said decision and judgment were made, duly authenticated, may be sent to the United States Circuit Court [105] of Appeals for the Ninth Circuit, and that said decision and judgment may be reversed and the ruling of the Secretary of Labor be affirmed and established.

Dated, Honolulu, T. H., Feb. 24, A. D. 1923.

RICHARD L. HALSEY,

Inspector-in-Charge of Immigration at the  
Port of Honolulu,

Respondent,

By WILLIAM T. CARDEN,

United States District Attorney,

FRED PATTERSON,

Assistant U. S. District Atty.,

EATON H. MAGOON,

Assistant U. S. District Atty.,

His Attorneys.

**Order Allowing Appeal.**

The foregoing petition is hereby granted and the appeal allowed; and it is ordered that a certified transcript of the record, papers, and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

As it appears to the Court that this appeal is being taken by direction of a Department of the Government of the United States, no bond will be required.

Done in open court this 24 day of February, A. D. 1923.

J. B. POINDEXTER,

Judge, United States District Court for the District and Territory of Hawaii. [106]

---

From the Minutes of the United States District Court, Territory of Hawaii—Monday, March 6, 1922.

(Title of Court and Cause.)

**Minutes of Court—March 6, 1922—Order Overruling Demurrer to Return of Respondent to Order to Show Cause, Fixing Bond and Directing Issuance of Writ of Habeas Corpus.**

On this day came Mr. J. Lightfoot, counsel for the above-named applicant, and also came Mr. S. C. Huber, United States District Attorney, Counsel for the respondent herein, and this cause

was called for hearing. Mr. Lightfoot thereupon filed in open court a demurrer to the return of respondent to the order to show cause, and after due argument by counsel, said demurrer was overruled "*pro forma*" and to which ruling Mr. Lightfoot entered an exception. Thereupon the Court ordered that a writ of habeas corpus issued herein, returnable March 13, 1922, at 2 o'clock P. M., and fixed bond in the sum of \$2000.00. Thereafter hearing was had upon the motion to amend the petition, and after hearing said motion was granted and the Clerk directed to insert the amendments. It was then stipulated by counsel that the return as filed originally stand as the return to the amended petition, which stipulation was allowed by the Court. [107]

---

From the Minutes of the United States District Court, Territory of Hawaii—Thursday, August 10, 1922.

(Title of Court and Cause.)

**Minutes of Court—August 10, 1922—Decision—  
Order Sustaining Demurrer to Return to Order  
to Show Cause.**

On this day came Mr. J. Lightfoot, counsel for the applicant above named, and also came Mr. W. T. Carden, United States Attorney, counsel for the respondent herein, and this cause was called for decision on the demurrer to the return to the order to show cause. The Court read and filed its decision



sustaining said demurrer. Exception by Mr. Carden was allowed and the respondent was given two weeks within which time to further plead or answer. [108]

---

From the Minutes of the United States District Court, Territory of Hawaii—Wednesday, October 4, 1922.

(Title of Court and Cause.)

**Minutes of Court—October 4, 1922—Order Sustaining Demurrer to Amended Return Herein, Making Writ Issues Herein Permanent and Stipulation Allowing Respondent Ninety Days to Perfect Appeal.**

On this day came Mr. J. Lightfoot, one of counsel for the above-named applicant, and also came Mr. W. T. Carden, United States District Attorney, counsel for the respondent herein, and this cause was called for hearing on the demurrer to the amended return in this cause. The Court sustained said demurrer and Mr. Carden having declined to further plead, excepted to the ruling of the Court, which exception was allowed. Thereafter upon motion of Mr. Lightfoot the Court ordered that the writ of habeas corpus herein be made permanent, to which ruling Mr. Carden further excepted, exception being allowed; an appeal was noted by Mr. Carden and stipulation by counsel that the respondent herein be given ninety days to perfect an appeal was allowed by the Court. [109]



In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a writ of Habeas Corpus. Praeceptum for Transcript of Record. Filed Apr. 13, 1923, at 11 o'clock and — Minutes A. M. Wm. L. Rosa, Clerk. By —————, Deputy Clerk. William T Carden, United States District Attorney for the Territory of Hawaii. Fred Patterson, Assistant United States Attorney. Eaton H. Magoon, Assistant United States Attorney, Attorneys for Richard L. Halsey, Inspector of the Port of Honolulu, Appellant. [110]

---

In the District Court of the United States in and for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU, Otherwise Known as HO SHEE, for a Writ of Habeas Corpus.

**Praeceptum for Transcript of Record.**

To WILLIAM ROSA, Esq., Clerk of the Above-entitled Court:

You will please prepare and certify a transcript of the record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit on the appeal heretofore allowed, and include in said transcript the following pleadings, proceedings, opinion, judgment and other papers on file in this cause, to wit:

1. Petition for writ of habeas corpus and order to show cause.
2. Return of respondent thereto.
3. Demurrer to return.
4. Motion to amend writ.
5. *Pro forma* order overruling demurrer and directing writ to issue.
6. Return to writ.
7. Demurrer to return.
8. Opinion.
9. Motion to amend return.
10. Stipulation of September 28, 1922.
11. Amended return.
12. Demurrer to amended return.
13. Judgment.
14. Stipulation of December 30, 1922.
15. Stipulation of February 2, 1923.
16. Petition for allowance of appeal to United States Circuit Court of Appeals for the 9th Circuit and order allowing same. [111]
17. Clerk's minutes.
18. This praecipe.

You will also please annex to and transmit with the record the original assignment of errors on appeal, the original citation, the acknowledgment of service by Harry Irwin, Esquire, attorney for appellee, and the originals of the following stipulations and orders:

Order extending time to file record to April 24, 1923.  
Stipulation relating to translation of Chinese,  
March 12.

Stipulation regarding printing of duplicate portions of record, March 12.

Stipulation relating to omissions of two (2) cases in the Immigration records.

Also your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Dated Honolulu, T. H., April 13, 1923.

WILLIAM T. CARDEN,  
United States District Attorney,  
FRED PATTERSON,  
Assistant United States Attorney,  
EATON H. MAGOON,  
Assistant United States Attorney,  
Attorneys for RICHARD L. HALSEY,  
Inspector of the Port of Honolulu, Appellant.

I certify that I served a copy of the within prae-cipe upon Harry Irwin, Esq., attorney for appellee herein, by mailing a copy of the same to him to his office in Hilo, Hawai.

(S.) WILLIAM T. CARDEN. [112]

---

In the District Court of the United States in and for the Territory of Hawaii.

In the Matter of the Application of HO AH KEAU, Otherwise Known as HO SHEE, for a Writ of Habeas Corpus.

**Assignment of Errors.**

Now comes the respondent herein, Richard L. Halsey, Inspector-in-Charge of Immigration at

the Port of Honolulu, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

1. That the said Court erred in sustaining the demurrer to the amended return to the order to show cause.

2. That the said Court erred in holding that petitioner is the lawful wife of Lau Ah Leong.

3. That the said Court erred in holding that Parke vs. Parke, 25 Haw. 397, overruled the case of Godfrey vs. Rowland, 17 Haw. 577, holding that common-law marriages are valid in Hawaii.

4. That the said Court erred in holding that Parke vs. Parke, 25 Haw. 397, held that common-law marriages were not valid in Hawaii.

5. That said Court erred in holding that the case of Parke vs. Parke, *supra*, governed the present case.

6. That the Court erred in holding that the decision in Parke vs. Parke, *supra*, was determinative of the law as it was in Hawaii at the time the marriage between L. Ah Leong and Hung Shee was consummated. [113]

7. That the Court erred in holding that the case of Parke vs. Parke, *supra*, was authority in Hawaii, for the proposition that a common-law marriage was invalid in Hawaii.

8. That said Court erred in holding that the presumption that when parties cohabit who are legally competent to enter into the marriage relation, they are presumed to have complied with all the requirements of the law necessary to make a

valid marriage contract, did not apply to the relationship between L. Ah Leong, and Hung Shee.

9. That said Court erred in holding that the presumption of a valid marriage arising from reputation and cohabitation is overcome and was overcome in the instant case, by the showing of a subsequent marriage ceremony between L. Ah Leong, and Ho Shee with a license as required by law.

10. That said Court erred in holding that the evidence showed that no marriage license was procured and that other requirements of the statutes of Hawaii were not complied with at the inception of cohabitation between L. Ah Leong and Hung Shee.

11. That said Court erred in holding that petitioner by proof of a ceremonial marriage to L. Ah Leong in 1891, with a marriage license made out a *prima facie* case of a right to enter the United States.

12. That the Court erred in holding that common-law marriages are void in Hawaii.

13. That said Court erred in holding that the local law of Hawaii on the marriage status controls the right of immigrants to enter the United States at Honolulu as a port of entry. [114]

14. That said Court erred in holding that the local law of marriage in Hawaii was controlling on the question as to whether the marriage of L. Ah Leong and Hung Shee, or of L. Ah Leong and Ho Shee, was valid as determinative of the right of petitioner to enter the United States.



15. That the Court erred in holding that Hung Shee was not the lawful wife of L. Ah Leong.

16. That said Court erred in holding that there was evidence which showed affirmatively that there had been no ceremonial marriage and no marriage license between Hung Shee and L. Ah Leong.

17. That the Court erred in holding that a showing of a ceremonial marriage between petitioner and L. Ah Leong put the burden of proof upon respondent to show that there was a prior and subsisting valid marriage between L. Ah Leong and Hung Shee in order to defeat petitioner's right to enter the United States.

18. That the said Court erred in holding that the ruling of the Secretary of Labor that the applicant had not established that she was the person she purported to be was unsupported by any evidence whatsoever.

19. That said Court erred in holding that the finding of the Secretary of Labor that petitioner had not identified herself as Ah Keau was not conclusive.

20. That the Court erred in holding that the finding of the dissenting member of the Special Board of Inquiry affirmed by the Secretary of Labor, that petitioner was a believer in polygamy and as such not entitled to enter the United States was entirely unsupported by evidence.

21. That the said Court affirmatively found that the evidence of the applicant was not true, and thereby committed error in holding that her

denial of a belief in the practice of polygamy was binding upon the Secretary of Labor. [115]

22. That the said Court erred in holding that existence of a belief in polygamy could not be made out by circumstantial evidence.

23. That the said Court erred in holding that there was no evidence in the record from which it could be found that the applicant was a believer in polygamy.

24. That the said Court erred in holding that affirmative evidence must be produced in the record in order to authorize the denial of the right to enter the United States to the petitioner upon the ground that she was a believer in polygamy.

25. That said Court erred in holding that there was no evidence to justify the denial of the right to enter the United States to applicant upon the ground that she was a believer in the practice of polygamy.

26. That said Court erred in holding that the burden of proving that she was not within the class of prohibited aliens or believers in polygamy was not upon the applicant.

27. That the said Court erred in holding that the burden of proof was upon the Government to show that applicant was a believer in the practice of polygamy.

28. That the Court erred in holding that the burden of proof was upon the Government to show that applicant was not entitled to enter the United States.

29. That the Court committed error in finding that there was no evidence in the record which could support and justify the decision and finding of the Secretary of Labor.

30. That said Court erred in ordering that the writ of habeas corpus be made perpetual.

Dated: February 24th, 1923.

WILLIAM T. CARDEN,  
United States Attorney,  
FRED PATTERSON,  
Assistant United States Attorney,  
EATON H. MAGOON,  
Assistant United States Attorney,  
Attorneys for Richard L. Halsey. [116]

---

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States to Ho Ah  
Keau, Otherwise Known as Ho Shee, and to  
J. Lightfoot, Esq., and Harry Irwin, Esq.,  
Her Attorneys, GREETING:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of  
Appeals for the Ninth Circuit, to be held at the  
City and County of San Francisco, State of Cali-

fornia, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the District and Territory of Hawaii, wherein Richard L. Halsey, Inspector-in-charge of Immigration at the Port of Honolulu is appellant, and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 24th day of February, 1923, and of the Independence of the United States one hundred and forty.

[Seal] J. B. POINDEXTER,  
Judge, U. S. District Court, District and Territory of Hawaii. [117]

---

In the District Court of the United States in and  
for the Territory of Hawaii.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Acknowledgment of Receipt of Papers on Appeal.**

Received a copy of the foregoing petition for and allowance of appeal, assignment of errors, citation on appeal, this 1st day of March, 1923.

(Sgd.) HARRY IRWIN,  
Attorney for Ho Ah Keau, Otherwise Known as  
Ho Shee.



Filed Apr. 13, '23, at 9 o'clock and 45 minutes  
A. M. (Sgd.) Wm. L. Rosa, Clerk. [118]

---

In the United States Circuit Court of Appeals  
for the Ninth Circuit. In the Matter of the Appli-  
cation of Ho Ah Keau, Otherwise Known as Ho  
Shee, for a Writ of Habeas Corpus. Stipulation.  
Filed March 12, 1923, at 3 o'clock and 30 Minutes  
P. M. Wm. L. Rosa, Clerk. By Wm. F. Thomp-  
son, Jr., Deputy Clerk. William T. Carden, United  
States District Attorney for the Territory of Hawaii,  
Fred Patterson, Assistant United States Attorney,  
Eaton H. Magoon, Assistant United States Attor-  
ney, Attorneys for Respondent Richard L. Halsey.  
[119]

---

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Stipulation Re Translation of Chinese Characters.**

Now come the parties herein, to wit, Ho Ah  
Keau, *alias* Ho Shee and Richard L. Halsey, In-  
specter-in-Charge of Immigration at the Port of  
Honolulu, and stipulate, subject to the approval  
of the Court, that all Chinese characters in the  
record on appeal in the above-entitled cause be  
not translated, it being stipulated and agreed that



all such Chinese characters represent either signatures only or translations of English which appear on the same document.

Dated at Honolulu, T. H., this 12th day of March, A. D. 1923.

HO AH KEAU, *alias* HO SHEE.

By HARRY IRWIN,

Her Attorney.

RICHARD L. HALSEY,

Inspector-in-Charge of Immigration at the Port  
of Honolulu.

By WILLIAM T. CARDEN,

United States District Attorney,

His Attorney.

Approved:

J. B. POINDEXTER,

Judge. [120]

---

In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Stipulation. Filed March 12, 1923, at 3 o'clock and 30 Minutes P. M. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Jr., Deputy Clerk. William T. Carden, United States District Attorney for the Territory of Hawaii, Fred Patterson, Assistant United States Attorney, Eaton H. Magoon, Assistant United States Attorney, Attorneys for Respondent Richard L. Halsey. [121]

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Stipulation Re Printing of Duplicate Portions of  
Record.**

Now come the parties herein, to wit, Ho Ah  
Kau, *alias* Ho Shee, and Richard L. Halsey, In-  
spector-in-Charge of Immigration at the Port of  
Honolulu, and stipulate that duplicates of papers  
and proceedings in the record on appeal herein  
shall not be printed, but that all records or docu-  
ments appearing more than once in the record  
be printed once only.

Dated at Honolulu, T. H., this 12th day of March,  
A. D. 1923.

HO AH KEAU, *alias* HO SHEE.

By HARRY IRWIN,

Her Attorney.

RICHARD L. HALSEY,

Inspector-in-Charge of Immigration at the Port  
of Honolulu.

By WILLIAM T. CARDEN,

United States District Attorney,

His Attorney.

Approved:

J. B. POINDEXTER,

Judge. [122]

In the District Court of the United States in and  
for the District and Territory of Hawaii.

No. 174.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE,  
for a Writ of Habeas Corpus.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

United States of America,  
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the District Court of  
the United States for the Territory of Hawaii, do  
hereby certify the foregoing pages, numbered from  
1 to 376, inclusive, to be a true and complete tran-  
script of the record and proceedings had in said  
court in the matter of the application of Ho Ah  
Keau, otherwise known as Ho Shee, for a writ of  
habeas corpus, as the same remains of record and  
on file in my office, and I further certify that I  
hereto annex the original order extending time to  
transmit record on appeal, assignment of errors,  
citation on appeal and two (2) stipulations on  
said cause.

I further certify that the costs of the foregoing  
transcript of record is \$282.05 and that said  
amount has been charged by me in my account  
against the United States.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 13th day of April, A. D. 1923.

[Seal] WM. L. ROSA,  
Clerk, United States District Court, Territory of  
Hawaii. [123]

DEPARTMENT OF LABOR.

Gen. No. 16.

Registered

No. 55125/327.

65625

No letter attached

K

Washington, D. C., March 21, 1922.

I HEREBY CERTIFY that the annexed constitutes that portion of the file of the Bureau of Immigration in the case of Ho Shee which has originated subsequent to the certification of the complete record of the said case on February 11, 1922.

I. F. WIXON,

Assistant Commissioner General of Immigration.

(Official Title.)

OFFICE OF THE SECRETARY.

I HEREBY CERTIFY that I. F. WIXON, who signed the foregoing certificate, is now, and was at the time of signing, Assistant Commissioner General of Immigration, and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this 21st day of

March, in the year of our Lord one thousand nine hundred and twenty-two.

E. J. HENNING,  
Assistant Secretary of Labor.

[Seal—Department of Labor.]

WCW. [124]

55125/327.

March 6, 1922.

In re: HO SHEE.

Considered and Recommended that the previous decision be amended so as to provide that the appeal of the dissenting member of the Board of Special Inquiry be sustained and the exclusion of the alien be directed.

ROBE CARL WHITE,  
Chairman Board of Review,

ES/JMC.

So ordered:

E. J. HENNING,  
E. J. HENNING,  
Assistant Secretary. [125]

No. 55125/327.

March 6, 1922.

In re HO SHEE,

MEMORANDUM FOR THE ASSISTANT SECRETARY:

The case of the above-named Chinese woman was before the Department some time ago, on appeal from the Honolulu office, two members of the board of special inquiry having voted to admit, and one having dissented and appealed from the admitting decision of the other two.



The Bureau, in sending out the Department's decision, advised the Inspector-in-Charge at Honolulu that the appeal "has been dismissed," which, given its true meaning, would mean that the appeal of the dissenting member had been dismissed, thereby resulting in the decision of the majority, to admit, being sustained. This was an unfortunate and erroneous use of words, and was caused no doubt by the fact that, ordinarily, in sending out a decision to deport, the word "Dismissed" is used. Under date of February 14, 1922, the Bureau wrote an explanatory letter to the Inspector-in-Charge at Honolulu, setting forth that, in fact, the appeal of the dissenting member had been sustained, and exclusion of the applicant, Ho Shee, directed.

The Inspector-in-Charge at Honolulu has now invited attention to the fact that the Board of Review, in preparing its recommendation for the Department, used the words "It is recommended that the appeal be denied," this leading to the same result as that which might have been caused by the use of the word "Dismissed," by the Bureau, as set forth in the second paragraph hereof.

As the Bureau recalls the matter, the recommendation of the Board of Review was "that the appeal be denied and deportation proceeded with."

The words "appeal be denied" are inconsistent with "and deportation proceeded with," the former, in effect, being tantamount to direction of admission of the applicant, while the latter, direct

deportation. As the Bureau recalls the matter, it was the view of all officers who handled the case, that the right of the applicant to enter had *not* been established, and it would therefore appear that the words "and deportation proceeded with" (if they were used, as the Bureau believes) were simply used to make the recommendation clear, and thereby avoid such a situation as has now arisen.

The Bureau recommends that the decision be amended (if as the Bureau believes, it was the intention to exclude Ho Shee) to read "that the appeal of the dissenting member of the board of special inquiry be sustained, and exclusion of the applicant, Ho Shee, directed."

I. F. DIXON,

Assistant Commissioner-General.

CEB. [126]

(POSTAL TELEGRAPH TELEGRAM HEAD.)

10 NY No. 76 GVT Radi Via NI San Diego 248 AM.

521

Red. Bu. of Immigration.

Mar. 6, 1922.

Mail and Files.

Honolulu, Mar. 5, 1922.

Gov. Lab. Immigration,

Washington.

Bureau letter Feb. fourteen Number 55125 dash 327 Received Period In same case finding of board of review dated Feby Eighth reads It is recommended that appeal be denied Period This finding approved by Secretary Period US At-

torney requests this finding be corrected to conform to facts and approved by Secretary Mail certified copy of corrections and of letter of February Fourteenth at once to be used in habeas corpus proceeding.

HALSEY. [127]

55125/327

February 14, 1922.

Inspector-in-Charge,  
Immigration Service,  
Honolulu, T. H.

Referring again to your files Nos. 4393/1 and 4382/212, the Bureau desires to explain its letter to you of the eleventh instant. Instead of saying that "the appeal of Ho Shee, *alias* Ho Ah Keau, has been dismissed," it should read, "the appeal in the case of Ho Shee, *alias* Ho Ah Keau, has been sustained and her deportation directed." The error in the wording of the letter was due to the fact that most appeals are taken by aliens excluded and when the letter was written the fact was overlooked that Ho Shee was not the appellant in this case, the case having been appealed against her by one of the members of the board of special inquiry. It is believed, however, that, taking the letter as a whole, you will understand the meaning of it even without this explanation, and especially in view of the fact that the Bureau's record in the case, including the

Department's decision, was certified and sent you for use in possible habeas corpus proceedings.

For the Commissioner-General:

For the Comm.-Gen.

(Signed) F. H. LARNED,  
Special Assistant.  
Feb. 14, 1922.

WCW. [128]

UNITED STATES DEPARTMENT OF LABOR.  
BUREAU OF IMMIGRATION.  
WASHINGTON.

Address reply to  
Commissioner-General of Immigration  
and refer to  
No. 55125/327.

February 11, 1922.

Messrs. Ralston and Hott,  
Attorneys at Law,  
Evans Building,  
Washington, D. C.

Sirs:

This is to advise you that the appeal of Ho Shee, *alias* Ah Keau, in which you are interested, has been dismissed.

Respectfully,

For the Commissioner-General:

For the Comm.-Gen.

(Signed) F. H. LARNED,  
Special Assistant.  
Feb. 13, 1922.

WCW. [129]

U. S. DEPARTMENT OF LABOR.  
BUREAU OF IMMIGRATION.  
WASHINGTON.

Address reply to  
Commissioner-General of Immigration  
and refer to  
No. 55125/327.

February 11, 1922.

Inspector-in-Charge,  
Immigration Service,  
Honolulu, T. H.

In reply to your letter of Jan. 5, 1922, No. 4393/1

4382/212, you are advised that the appeal of Ho Shee, *alias* Ho Ah Keau, has been dismissed.

The exhibits in the case are herewith returned, and there is also being sent you herewith, in accordance with your request, Bureau file No. 55125/-327, duly certified, covering the case of Ho Shee. It is requested that the same be promptly returned when no longer needed in connection with the expected habeas corpus proceedings.

For the Commissioner-General:

For the Comm.

(Signed) F. H. LARNED,  
Special Assistant.

Feb. 13, 1922.

WCW.

Incl. 5674 (certified record).

Incl. 5675. [130]



DEPARTMENT OF LABOR.

Gen. No. 16.

No. 55125/327.

Washington, D. C., February 11, 1922.

I HEREBY CERTIFY that the annexed is the original and complete file of the Bureau of Immigration covering the case of Ho Shee, *alias* Ho Ah Keau.

For the Commissioner-General of Immigration:

For the Comm.-Gen.

(Signed) F. H. LARNED,  
Special Assistant.

Feb. 14, 1922.

OFFICE OF THE SECRETARY.

I HEREBY CERTIFY that F. H. Larned, who signed the foregoing certificate, is now, and was at the time of signing, Special Assistant to the Commissioner General of Immigration, and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this eleventh day of February, in the year of our Lord one thousand nine hundred and twenty-two.

(Signed) E. J. HENNING,  
Assistant Secretary of Labor.

Feb. 14, 1922,

Mail and Files.

WCW. [131]

DEPARTMENT OF LABOR.  
OFFICE OF THE ASSISTANT SECRETARY.  
WASHINGTON.

No. 55170/79

August 23, 1921.

Inspector-in-Charge,  
Immigration Service,  
Honolulu, T. H.

It has been brought to the attention of the Department by Hon. J. Kuhio Kalanianaʻole, Delegate in Congress from Hawaii, that, in connection with an equity suit pending in the courts of Hawaii, it is necessary to examine the record of the registration of one Dai Kim, *alias* Mrs. L. Ah Leong, and L. Ah Leong. Unless you know of some good reason to the contrary, it is directed that the appropriate person, designated by the Court, be allowed to inspect said record, which is said to be a part of your files.

E. J. HENNING,  
Assistant Secretary.

CEB. [132]

COMMERCIAL TRAFFIC.

U. S. NAVAL COMMUNICATION SERVICE.

Station. or U. S. S. Date.

25 MA SM 30 GAVT.

Washington, D. C., 26th.

Immigration Service,

Honolulu.

Unless good reasons to contrary exist, allow person designated by court to inspect your registration records Dai Kaim and L. Ah Leong connection pending equity suit.

HENNING.

1045 AM. [133]

Confirmation of Telegram.

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

WASHINGTON.

No. 55170/79

August 26, 1921.

Immigration Service,

Honolulu, T. H.

Unless good reasons to contrary exist, allow person designated by court to inspect your registration records Dai Kim and L. Ah Leong, connection pending equity suit.

HENNING.

Attest:

(Sgd.) E. J. HENNING,

Assistant Secretary.

CEB.

PREPAID: Charge to account of J. Kuhio Kala-  
niana'ole, Delegate in Congress from Hawaii.

The above is an official copy of telegram sent this day.

ALFRED HAMPTON,  
Assistant Commissioner General. [134]

Application of Alleged American-Born Chinese for  
Preinvestigation of Status.

Form 430 (Chinese Writing) ORIGINAL  
U. S. DEPARTMENT OF LABOR.  
Immigration Service.

Office of Inspector-in-Charge.  
Port of Honolulu, T. H.,  
Feb. 4, 1919.

4393

---

1

To Richard L. Halsey,  
Chinese and Immigrant Inspector.  
Honolulu, T. H.

EDWIN FARMER

PHOTOGRAPH  
HERE  
ATTACHED

SIR: It being my intention to leave the United States on a temporary visit abroad, departing and returning through the Chinese port of entry of Honolulu, T. H., I hereby apply, under the provisions of Rule 16 of the Chinese Regulations, for preinvestigation of my claimed status as an American citizen by naturalized birth, submitting herewith such documentary proofs (if any) as I possess, and agreeing to appear at such time and place as you

may designate, and to produce then and there witnesses, for oral examination regarding the claim made by me.

H. B. BROWN

This application is submitted in triplicate with my photograph attached to each copy, as required by said rule.

Respectfully,

Signature in Chinese—(Chinese characters).

Signature in English—LAU AH LEONG.

Address (Chinese characters).

(Paragraph of Chinese characters).

[Seal]

Departed from Honolulu per S. S. "Shinyo Maru,"  
Honolulu, T. H., Jul. 5, 1919.

April 29, 1919.

Respectfully forwarded to

THE INSPECTOR IN CHARGE, Port of Honolulu, T. H., accompanied by triplicate hereof and report and transcripts of testimony, in accordance with Rule 16.

Bureau of Immigration.

Washington, D. C., May 17, 1919.

Approved:

EDWIN FARMER,

Chinese and Immigrant Inspector.

Port of Honolulu, T. H.,

July 5, 1919.

Assistant Commissioner-General of Immigration.



This is certify that the person of Chinese descent named herein, and whose photograph is attached under the signature of the investigating officer and under my signature and seal, to the above application, has filed in my office the duplicate of this application, and evidence in corroboration of his claimed American birth. Upon his return to this port and his identification as the person to whom this paper, thus approved, is delivered, he will be permitted to re-enter the United States, unless pending such return it has been found that his claim is false.

2/18/8:30.

HARRY B. BROWN,  
Acting Inspector-in-Charge.  
American Consulate General.  
Mar. 23, 1920.  
Hongkong.

American  
Consular Service  
\$1  
Fee Stamp

SEEN  
at the  
Consulate General of the  
United States at Hongkong,  
this 23d day of March, 1920.

J. J. CUNNINGHAM, Jr.  
Vice-Consul.

Mite Fee  
No.

1774

(Seal)

[135]

DEPARTMENT OF LABOR.

Lau Ah Leong.

Admitted P. E. Apl. 13/20.

Not citizen.

resident.

male.

Apr. 24, 1920.

Received back Copy

I on this date.

#1932.

LAU AH LEONG.

Ent. April 16th, 1920. [136]

Application of Alleged American-Born Chinese for  
Preinvestigation of Status.

Form 430.

DUPLICATE.

(Chinese Writing.)

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Office of Inspector in Charge.

Port of Honolulu, T. H.,

Feb. 4, 1919.

4393

---

1

To Richard L. Halsey,

Chinese and Immigrant Inspector,

Honolulu, T. H.

SIR: It being my intention to  
leave the United States on a  
temporary visit abroad, depart-  
ing and returning through the  
Chinese port of entry of Hono-

EDWIN FARMER

PHOTOGRAPH

HERE

ATTACHED

lulu, T. H., I hereby apply, under the provisions of Rule 16 of the Chinese Regulations, for preinvestigation of my claimed status as an American citizen by ~~birth~~ naturalized, submitting herewith such documentary proofs (if any) as I possess, and agreeing to appear at such time and place as you may designate, and to produce then and there witnesses, for oral examination regarding the claim made by me.

H. B. BROWN

This application is submitted in triplicate with my photograph attached to each copy, as required by said rule.

Respectfully,

Signature in Chinese (Chinese writing).

Signature in English (Chinese writing) LAU AH LEONG.

Address (Chinese writing.)

(Paragraph of Chinese Writing.)

(Line of Chinese writing.)

Bureau of Immigration,

Washington, D. C. May 17, 1919, Honolulu, T. H.

Approved:

Assistant Commissioner-General of Immigration.

The triplicate of this application having been returned to me by the officer in charge at the port of intended departure, with advices that said officer

is prepared to approve the original application, this duplicate is delivered to the applicant (with my signature written across the margin of the photograph), who must exchange it at the office of the immigration officer in charge at the port of departure for the original. This duplicate is of no value further than to identify the holder as the person whose status has been investigated.

Departed from Honolulu, per S. S. "Shinyo Maru," July 5, 1919.

---

Chinese and Immigrant Inspector. [137]

Address Official Communications to  
The Secretary of State,  
Washington, D. C.

DEPARTMENT OF STATE.  
WASHINGTON.

May 22, 1919.

In reply refer to  
PC.

Immigration Inspector-in-Charge,  
Honolulu, T. H.

Sir:

The Department has received the application of Lau ah Leong for a passport for China.

Attached to the application you will find a certificate enclosed known as "form 430" which Mr. Alfred Hampton, Assistant Commissioner General,

requested be forwarded to you for your signature.

I am, sir,

Your obedient servant,

R. W. FLOURNOY, Jr.,

Chief, Division of Passport Control.

PC. MKV:REL.

Enclosure.

Certificate. [138]

54624/211.

May 17, 1919.

Mr. R. W. Flournoy, Jr.,

Chief, Division of Passport Control,

Department of State.

Dear Sir:

The Bureau incloses, in accordance with the present understanding, the passport application of Lau Ah Leong, to which is attached a one-dollar bill and a loose photograph, and the duplication of Form 430, which reached it through the Inspector-in-Charge at Honolulu, T. H., with the proof upon which this Chinese bases his claim of citizenship.

The evidence submitted and adduced upon the investigation of the status of Lau Ah Leong is found reasonably to establish his American citizenship by virtue of his naturalization under the Hawaiian Kingdom. The opinion is accordingly expressed that he should be regarded as a citizen of the United States.

It is requested that, after the duplicate of Form 430 has served its purpose, it be forwarded to the



Inspector-in-Charge at Honolulu, T. H., for completion by his signature.

Respectfully,

---

Assistant Commissioner-General.

CR.

Incl. 4678.

OFFICIAL COPY referred to the Inspector in Charge at Honolulu, T. H., acknowledging the receipt of his letter of the 29th ultimo, No. 4393, and returning all the inclosures therewith received with the exception of those mentioned in above letter.

ALFRED HAMPTON,  
Assistant Commissioner-General.

CR.

Incl. 4701. [139]

No. 131.

TERRITORY OF HAWAII.  
OFFICE OF THE SECRETARY.  
(SEAL)

Good.

Robert M. McWade,  
U. S. Consul-General.  
Canton, June 27, 1903.

To All to Whom These Presents Shall Come,  
GREETING:

I CERTIFY That hereto annexed is a true copy of the record of naturalization of L. AH LEONG, formerly a citizen or subject of Canton, Kwang Tung, China, as shown by the records of this office; that the attached photograph is a good likeness of

the said L. Ah Leong, whose identity has been satisfactorily proven to me.

In testimony whereof, I, Henry E. Cooper, Secretary of the Territory of Hawaii, have hereunto subscribed my name and caused the Great Seal of the Territory to be affixed.

DONE AT THE CAPITOL in Honolulu this 27th day of May, A. D. 1901.

[Territorial Seal]

HENRY E. COOPER.

(Stamp)

PHOTOGRAPH. [140]

THE HAWAIIAN KINGDOM.  
RECORD OF NATURALIZATION.

In the Department of the Interior.

In the Matter of the Naturalization of L. AH  
LEONG.

BE IT REMEMBERED that on this — day of October, A. D. 1890, L. Ah Leong, an alien and late a subject or citizen of Canton, Kwang Tung, China, applied in writing to the Minister of the Interior to be admitted a Citizen of the Hawaiian Kingdom pursuant to the acts of the Hawaiian Legislature in relation thereto, and it appearing by his said application and by other satisfactory proofs that he has resided within the Kingdom for two years next preceding said application, and that he intends to become a permanent resident of this Kingdom, and that he is not a pauper nor a refugee from the justice of some other country, and his said application having been approved by the Minister of the Interior, and the said L. Ah Leong having on the 12th day of November, A. D. 1890, taken and

subscribed the Oath of Allegiance required by Law before J. A. Hassinger, Chief Clerk, Int. Dept., therefore I do admit the said L. Ah Leong and declare him to be a citizen of the Hawaiian Kingdom.

(Sgd.) C. N. SPENCER,  
Minister of the Interior.

(On back.) Re-certified copy of Naturalization Papers.

L. AH LEONG. [141]

U. S. IMMIGRATION SERVICE.

No. 4393/1.

Port of Honolulu, T. H.  
March 13, 1919.

Case of LAU AH LEONG, Application for a Form  
430 Certificate as a Naturalized Citizen.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Applicant presents C. I. No. 1932, issued under Bureau Circular No. 23, and a certified copy of the record of naturalization of L. Ah Leong, who became a citizen of Hawaii on November 12, 1890. He also presents an application for a passport with a one-dollar bill to pay for the same and a photograph of himself to be attached to the passport.

Applicant, sworn, testifies: C. I. #1932, green.

Q. What is your name and age?

A. Lau Ah Leong, or L. Ah Leong, *alias* Lau Fut Leong, 63 years old. (Family record on file.)

Q. Where were you born?

A. At Chung Yen, Ka Hing Cho district, China.

Q. How far is that from Canton?

A. About three days' travel by steamer.

Q. When did you come to Hawaii?

A. In 1881 I went from Hong Kong to San Francisco by the S. S. "City of Peking," stayed one week in San Francisco and then came to Hawaii by a different boat. I do not remember what boat that was, but it was a boat which ran to Sydney, Australia.

Q. How many times have you been back to China?

A. Three times; first time, in 1903, and returned to Hawaii the same year; second time, in 1910, and returned the same year; third time, in 1915, and returned in 1916. I arrived here on January 8th. (Applicant's naturalization record is visaed by the U. S. Consul General at Canton, June 27, 1903. He returned April 10, 1904, per S. S. "Gaelic." See old book No. 1, page 149. For the 1910 trip, see File No. 2302-C. For the last trip, see, previous record, this file.)

Q. You were naturalized as a citizen of Hawaii, were you?

A. Yes, in 1890. It was November 12th.

Q. Who administered the oath to you?

A. Mr. Hassinger.

Q. How long had you been in Hawaii at that time? A. About ten years—nine years.

Q. Who were your guarantors?

A. L. Ahlo, Jim Morgan, Mr. Levey.

Q. What was your occupation then?

A. I worked as a salesman for Lee Look Kee store, in Honolulu.

(The naturalization records show that L. Ah Leong applied for naturalization Nov. 9, 1890, and took the oath of allegiance to the Hawaiian Kingdom Nov. 12, 1890. It states that he was born at Canton, resided in Honolulu; occupation, merchant; oath administered by J. A. Hassinger; Guarantors; L. Ahlo, M. Phillips & Co., Lewis J. Levey, J. F. Morgan.)

(For applicant's family, see File No. 1892-C.)

Q. Why are you going to China?

A. Just on a pleasure trip.

Q. Not on business? A. No business.

LAU AH LEONG.

Applicant is informed by direction of the Inspector in Charge, that he has not shown an absolute necessity for traveling abroad, and that under the present regulations his application can not be considered.

#4393/1—LAU AH LEONG—Form 430—Nat. Cit.

3/13/19. [142]

In pencil.

(4393-1

Referring to 2302-C.)

UNITED STATES IMMIGRATION SERVICE.

Case of LAU AH LEONG, HK. 1-2, ex S/S.

"Shinyo Maru," January 18th, 1916.

Port of Honolulu, T. H.,  
January 18th, 1916.

FINDING.

This applicant, male, presents Certificate of Identity No. 1932, "green," showing him to be a



naturalized citizen of the United States, and is identified as the rightful holder of same.

It is recommended that he be admitted.

JACKSON L. MILLIGAN,

Immigration & Actg. Chinese Inspector.

Approved:

RICHARD L. HALSEY,

Inspector in Charge. [143]

4393/1.

April 29, 1919.

Commissioner-General of Immigration,

Washington, D. C.

As provided by Rule 16, of The Treaty Laws and Rules Governing the Admission of Chinese of May 1, 1917, I have the honor to transmit herewith the application for Form 430 of LAU AH LEONG, an alleged citizen, naturalized in Hawaii before annexation. The following records are inclosed:

Original and duplicate of Form 430.

Certificate of Identity #1932, green.

Applicant's statement of April 25, 1919.

Statement of Inspector of this date.

Copy of record of admission of Applicant April 10, 1904.

File number #2302-C.

File number #1892-C.

Certified copy of record of naturalization of the applicant, issued by the Secretary of Hawaii, May 27, 1901. The previous contents of this file contain the record of the admission of the applicant, January 18, 1916, and his statement of March 13, 1919.

As per instructions contained in Bureau letter #52088/64-A of October 3, 1917, pertaining to passports there is inclosed—

Applicant's passport application,  
A one-dollar bill, and  
A loose photograph of himself.

---

Inspector-in-Charge.

EF/MM.

(Mailed 4/29/19 M-M. Signed R. L. H.) [144]

CHAMBER OF COMMERCE OF HONOLULU.

Officers:

W. F. Dillingham, President.  
A. Lewis, Jr., First Vice-President.  
Geo. P. Denison, Second Vice-President.  
C. G. Heiser, Treasurer.  
Raymond C. Brown, Secretary.

Cable Address:

"Commerce, Honolulu"

Directors:

G. H. Angus	G. F. Bush	F. D. Lowrey	
J. J. Belser	J. L. Cockburn	W. C. McGonagle	
F. E. Blake	R. A. Cooke	L. T. Peck	
R. B. Booth	N. E. Gedge	L. A. Thurston	Honolulu, Hawaii
F. O. Boyer	F. J. Lindeman	J. T. Warren	April
F. A. Brown		John Waterhouse	Twenty-sixth Nineteen

United States Immigration Service,  
Honolulu.

Attention Mr. Farmer.

Dear Sir:—

In keeping with your request I beg to hand you herewith certificate of identity of Mr. Lau Ah Leong No. 1932.

Very truly yours,

RAYMOND C. BROWN. [145]

## FIRST BOOK.

CHINESE STATEMENTS from October 5, 1903,  
to May 6, 1904.

Page 149.

## COPY OF RECORD.

Case of L. AH LEONG, ex SS. "GAELIC," April  
10, 1904, Naturalized Citizen of Hawaii.

Applicant states on arrival that he lives on King  
Street, Honolulu. That he left June 2, 1903.  
Identified by J. Bayer, of Hackfeld & Co.

Admitted April 10, 1904.

(Signed) JOSHUA K. BROWN,  
Chinese Inspector-in-Charge. [146]

## FIRST BOOK.

CHINESE STATEMENTS from October 5, 1903,  
to May 6, 1904.

Page 149.

## COPY OF RECORD.

Case of L. AH LEONG, ex SS. "GAELIC," April  
10, 1904, Naturalized Citizen of Hawaii.

Applicant states on arrival that he lives on King  
Street, Honolulu. That he left June 2, 1903.  
Identification by J. Bayer, of Hackfeld & Co.

Admitted April 10, 1904.

(Signed) JOSHUA K. BROWN,  
Chinese Inspector-in-Charge. [147]

No. 4393/1.

April 22, 1919.

Mr. Raymond C. Brown,  
c/o Chamber of Commerce,  
Honolulu, T. H.

Dear Sir:

Referring to your communication of the 21st instant in re the application of Mr. L. Ah Leong for a citizen's certificate and a passport to go to China, I have to inform you that the applicant filed his application some time ago and a statement was made by him on March 13th, in which he said that the purpose of his going to China was just for pleasure and not for business. He was then informed that his application would not be considered by this office, as under the present passport regulations he had not shown an absolute necessity for travelling abroad. If anything has arisen *sine* then requiring his departure from the Islands it will be necessary for him to make another showing, and if he desires to go on commercial business he must make another application to the clerk of the United States district court and state that as his purpose and also a further declaration indicating the nature of the business and its necessity. To send on the application as it is at the present time would be useless as there is no doubt that it would be denied. The papers inclosed by you are therefore returned and you are advised to have the necessary amendments made.

---

Inspector-in-Charge.

Exact copy as signed by RLH. and mailed by EF. this day.

EF. [148]

Honolulu, Hawaii, April 21, 1919.

Mr. Richard L. Halsey,

Inspector-in-Charge,

United States Immigration Station,

Honolulu;

Dear Sir:—

Mr. L. Ah Leong, at No. 116 North King Street, this city, desires to leave the territory at the earliest convenience for China, and in his behalf I hereby desire to make formal application for the issuance to him of a passport.

Mr. Ah Leong is a merchant in Honolulu and has been for about 37 years. He is an American Citizen, having been naturalized under the Hawaiian Kingdom and carries "Record of Naturalization" executed and issued to him by the Minister of the Interior, and bears date of March 12, 1890; "Certificate of Naturalization" issued to him by the Secretary of Hawaii under date of May 27, 1901, and "Certificate of Identity" issued by the Inspector-in-Charge of the United States Immigration Service, Honolulu, No. 1932, bearing date of January 11, 1909. Mr. Ah Leong has executed before the Clerk of the United States District Court at Honolulu "Form for Naturalized Citizen" bearing date of February 4, 1919.

Mr. Ah Leong has been a particularly active man in business, and finds it necessary, in the interest of his business, to make a trip to China,



and prays that passport may be issued which will permit of his leaving Honolulu at the very earliest opportunity so that the interests which he has in China, and the interests which he has here may be continued and maintained in the same degree of efficiency.

For your convenience in placing Mr. Ah Leong's application before the Department in Washington, I am enclosing herewith—

Naturalization papers issued by the Hawaiian Kingdom;

Naturalization papers issued by the Secretary of Hawaii;

Form for Naturalized Citizen executed before the Clerk of the Court;

One Dollar;

One unmounted photograph of Mr. Ah Leong;

May I express the hope that favorable action be given this application so that Mr. Ah Leong's arrangements to leave may be executed, and also that the first two documents mentioned be returned to Mr. Ah Leong with passport.

Very truly yours,

RAYMOND C. BROWN,

For L. Ah Leong. [149]

Honolulu, Hawaii, April 21, 1919.

Mr. Richard L. Halsey,

Inspector-in-Charge,

United States Immigration Station,

Honolulu.

Dear Sir:

Mr. L. Ah Leong, at No. 116 North King Street,

this city, desires to leave the territory at the earliest convenience for China, and in his behalf I hereby desire to make formal application for the issuance to him of a passport.

Mr. Ah Leong is a merchant in Honolulu and has been for about 37 years. He is an American citizen, having been naturalized under the Hawaiian Kingdom and carries "Record of Naturalization" executed and issued to him by the Minister of the Interior, and bears date of March 12, 1890; "Certificate of Naturalization" issued to him by the Secretary of Hawaii under date of May 27, 1901, and "Certificate of Identity" issued by the Inspector in Charge of the United States Immigration Service, Honolulu, No. 1932, bearing date of January 11, 1909. Mr. Ah Leong has executed before the Clerk of the United States District Court at Honolulu "Form for Naturalized Citizen" bearing date of February 4, 1919.

Mr. Ah Leong has been a particularly active man in business, and finds it necessary, in the interest of his business, to make a trip to China, and prays that passport may be issued which will permit of his leaving Honolulu at the very earliest opportunity so that the interests which he has in China, and the interests which he has here may be continued and maintained in the same degree of efficiency.

For your convenience in placing Mr. Ah Leong's application before the Department in Washington, I am enclosing herewith—

Naturalization papers issued by the Hawaiian Kingdom;

Naturalization papers issued by the Secretary of  
Hawaii;

Form for Naturalized Citizen executed before the  
Clerk of the Court;

One Dollar;

One unmounted photograph of Mr. Ah Leong;

May I express the hope that favorable action be  
given this application so that Mr. Ah Leong's ar-  
rangements to leave may be executed, and also that  
the first two documents mentioned be returned to  
Mr. Ah Leong with passport.

Very truly yours,

RAYMOND C. BROWN,

For L. Ah Leong. [150]

U. S. IMMIGRATION SERVICE.

No. 4393/1.

Port of Honolulu, T. H., March 13, 1919.

Case of LAU AH LEONG, Applicant for a Form  
430 Certificate as a Naturalized Citizen.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Applicant presents C. I. No. 1932, issued under  
Bureau Circular No. 23, and a certified copy of the  
record of naturalization of L. Ah Leong, who  
became a citizen of Hawaii on November 12, 1890.  
He also presents an application for a passport with  
a one dollar bill to pay for the same and a photo-  
graph of himself to be attached to the passport.

Applicant, sworn, testifies: CI. #1932, green.

Q. What is your name and age?

A. Lau Ah Leong, or L. Ah Leong, *alias* Lau Fut  
Leong, 63 years old. (Family record on file.)

Q. Where were you born?

A. At Chun Yen, Ka Hing Cho district, China.

Q. How far is that from Canton?

A. About three days' travel by steamer.

Q. When did you come to Hawaii?

A. In 1881 I went from Hong Kong to San Francisco by the SS. "City of Peking," stayed one week in San Francisco and then came to Hawaii by a different boat. I do not remember what boat that was, but it was a boat which ran to Sydney, Australia.

Q. How many times have you been back to China?

A. Three times; first time, in 1903, and returned to Hawaii the same year; second time, in 1910, and returned the same year; third time, in 1915, and returned in 1916. I arrived here on January 8th. (Applicant's naturalization record is visaed by the U. S. Consul General at Canton June 27, 1903. He returned April 10, 1904, per SS. "Gaelic." See old book No. 1, page 149. For the 1910 trip, see File No. 2302-C. For the last trip, see previous record, this file.)

Q. You were naturalized as a citizen of Hawaii, were you?

A. Yes, in 1890. It was November 12th.

Q. Who administered the oath to you?

A. Mr. Hassinger.

Q. How long had you been in Hawaii at that time? A. About ten years—nine years.

Q. Who were your guarantors?

A. L. Ahlo, Jim Morgan, Mr. Levey.

Q. What was your occupation then?



A. I worked as a salesman for Lee Look Kee store, in Honolulu.

(The naturalization records show that L. Ah Leong applied for naturalization Nov. 9, 1890, and took the oath of allegiance to the Hawaiian Kingdom Nov. 12, 1890. It states that he was born at Canton, resided in Honolulu; occupation, merchant; oath administered by J. A. Hassinger; Guarantors; L. Ahlo, M. Phillips & Co., Lewis J. Levey, J. F. Morgan.) (For applicant's family, see File No. 1892-C.)

Q. Why are you going to China?

A. Just on a pleasure trip.

Q. Not on business? A. No business.

LAU AH LEONG.

Applicant is informed by direction of the Inspector-in-Charge, that he has not shown an absolute necessity for traveling abroad, and that under the present regulations his application cannot be considered.

#4393/1—Lau Ah Leong—Form 430—Nat. Cit.

3/13/19 [151]

#### U. S. IMMIGRATION SERVICE.

Port of Honolulu, T. H., March 13, 1919.

No. 4393/1.

Case of LAU AH LEONG, Applicant for a Form  
430 Certificate as a Naturalized Citizen.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Applicant presents C. I. No. 1932, issued under Bureau Circular No. 23, and a certified copy of the



record of naturalization of L. Ah Leong, who became a citizen of Hawaii on November 12, 1890. He also presents an application for a passport with a one dollar bill to pay for the same and a photograph of himself to be attached to the passport.

Applicant, sworn, testifies: CL. #1932, green.

Q. What is your name and age?

A. Lau Ah Leong, or L. Ah Leong, *alias* Lau Fut Leong, 63 years old. (Family record on file.)

Q. Where were you born?

A. At Chung Yen, Ka Hing Cho district, China.

Q. How far is that from Canton?

A. About three days' travel by steamer.

Q. When did you come to Hawaii?

A. In 1881 I went from Hong Kong to San Francisco by the SS. "City of Peking," stayed one week in San Francisco and then came to Hawaii by a different boat. I do not remember what boat that was, but it was a boat which ran to Sydney, Australia.

Q. How many times have you been back to China?

A. Three times; first time, in 1903, and returned to Hawaii the same year; second time, in 1910, and returned the same year; third time, in 1915, and returned in 1916. I arrived here on January 8th. (Applicant's naturalization record is visaed by the U. S. Consul General at Canton June 27, 1903. He returned April 10, 1904, per SS. "Gaelic." See old book No. 1, page 149. For the 1910 trip, see File

No. 2302-C. For the last trip, see previous record, this file.)

Q. You were naturalized as a citizen of Hawaii, were you?

A. Yes, in 1890. It was November 12th.

Q. Who administered the oath to you?

A. Mr. Hassinger.

Q. How long had you been in Hawaii at that time?

A. About ten years—nine years.

Q. Who were your guarantors?

A. L. Ahlo, Jim Morgan, Mr. Levey.

Q. What was your occupation then?

A. I worked as a salesman for Lee Look Kee store, in Honolulu.

(The naturalization records show that L. Ah Leong applied for naturalization Nov. 9, 1890, and took the oath of allegiance to the Hawaiian Kingdom Nov. 12, 1890. It states that he was born at Canton, resided in Honolulu; occupation, merchant; oath administered by J. A. Hassinger; Guarantors; L. Ahlo, M. Phillips & Co., Lewis J. Levey, J. F. Morgan.) (For applicant's family, see File No. 1892-C.)

Q. Why are you going to China?

A. Just on a pleasure trip.

Q. Not on business? A. No business.

LAU AH LEONG.

Applicant is informed by direction of the Inspector-in-Charge, that he has not shown an absolute necessity for traveling abroad, and that under the

present regulations his application cannot be considered.

#4393/1—LAU AH LEONG—Form 430—Nat. Cit.

3/13/19 [152]

U. S. IMMIGRATION SERVICE.

No. 4393/1.

Port of Honolulu, T. H., March 13, 1919.

Case of LAU AH LEONG, Applicant for a Form  
430 Certificate as a Naturalized Citizen.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Applicant presents C. I. No. 1932, issued under Bureau Circular No. 23, and a certified copy of the record of naturalization of L. Ah Leong, who became a citizen of Hawaii on November 12, 1890. He also presents an application for a passport with a one dollar bill to pay for the same and a photograph of himself to be attached to the passport.

Applicant, sworn, testifies: CL. #1932, green.

Q. What is your name and age?

A. Lau Ah Leong, or L. Ah Leong, *alias* Lau Fut Leong, 63 years old. (Family record on file.)

Q. Where were you born?

A. At Chung Yen, Ka Hing Cho District, China.

Q. How far is that from Canton?

A. About three days' travel by steamer.

Q. When did you come to Hawaii?

A. In 1881 I went from Hong Kong to San Francisco by the SS. "City of Peking," stayed one week in San Francisco and then came to Hawaii by a different boat. I do not remember what boat

that was, but it was a boat which ran to Sidney, Australia.

Q. How many times have you been back to China?

A. Three times; first time, in 1903, and returned to Hawaii the same year; second time, in 1910, and returned the same year; third time, in 1915, and returned in 1916. I arrived here on January 8th. (Applicant's naturalization record is visaed by the U. S. Consul General at Canton June 27, 1903. He returned April 10, 1904, per SS. "Gaelic." See old book No. 1, page 149. For the 1910 trip, see, File No. 2302-C. For the last trip, see, previous record, this file.)

Q. You were naturalized as a citizen of Hawaii, were you?

A. Yes, in 1890. It was November 12th.

Q. Who administered the oath to you?

A. Mr. Hassinger.

Q. How long had you been in Hawaii at that time? A. About ten years—nine years.

Q. Who were your guarantors?

A. L. Ahlo, Jim Morgan, Mr. Levey.

Q. What was your occupation then?

A. I worked as a salesman for Lee Look Kee store, in Honolulu.

(The naturalization records show that L. Ah Leong applied for naturalization Nov. 9, 1890, and took the oath of allegiance to the Hawaiian Kingdom Nov. 12, 1890. It states that he was born at Canton, resided in Honolulu; occupation, merchant; oath administered by J. A. Hassinger; Guar-

antors; L. Ahlo, M. Phillips & Co., Lewis J. Levey, J. F. Morgan.) (For applicant's family, see, File No. 1892-C.)

Q. Why are you going to China?

A. Just on a pleasure trip.

Q. Not on business?      A. No business.

LAU AH LEONG.

Applicant is informed by direction of the Inspector-in-Charge that he has not shown an absolute necessity for traveling abroad, and that under the present regulations his application cannot be considered.

#4393/1—Lau Ah Leong—Form 430—Nat. Cit.  
3/13/19. [153]

Application Alleged American-Born Chinese for  
Preinvestigation of Status.

Form 430.      TRIPLICATE.

U. S. DEPARTMENT OF LABOR.

Immigration Service.

4393

---

54

Office of Inspector-in-Charge.

Port of Honolulu, T. H.

Feb. 4, 1919.

To Richard L. Halsey,

Chinese and Immigrant Inspector.

Honolulu, T. H.

Sir: It being my intention to leave the United States on a temporary visit abroad, departing and



returning through the Chinese port of entry of  
Honolulu, T. H., I hereby  
EDWIN FARMER apply, under the provisions  
of Rule 16 of the Chinese  
PHOTOGRAPH Regulations, for preinvesti-  
gation of my claimed status  
HERE as an American Citizen by  
ATTACHED ~~birth~~ naturalized submitting  
herewith such documentary proofs (if any) as I  
possess, and agreeing to appear at such time and  
place as you may designate, and to produce then  
and there witnesses, for oral examination regard-  
ing the claim made by me.

This application is submitted in triplicate with  
my photograph attached to each copy, as required  
by said rule.

Respectfully,

Signature in Chinese (Chinese writing).

Signature in English (Chinese writing).

LAU AH LEONG.

Address (Chinese writing).

(A paragraph of Chinese writing.)

Departed from Honolulu per SS. "Shinyo  
Maru," Jul. 5, 1919.

Port of Honolulu, T. H., Jul. 5, 1919.

Respectfully returned to

---

Chinese and Immigrant Inspector.

With the information that I am — prepared,  
on the basis of the evidence submitted with the

original of this application, to approve said application.

H. B. BROWN,  
Officer-in-Charge. [154]

FIRST BOOK.

CHINESE STATEMENTS from October 5, 1903,  
to May 6, 1904.

Page 149.

COPY OF RECORD.

Case of L. AH LEONG, ex SS. "Gaelic," April 10,  
1904. Naturalized Citizen of Hawaii.

Applicant states on arrival that he lives on King  
Street, Honolulu. That he left June 2, 1903.  
Identified by J. Bayer, of Hackfeld & Co.

Admitted April 10, 1904.

(Signed) JOSHUA K. BROWN,  
Chinese Inspector-in-Charge. [155]

4393/1

U. S. IMMIGRATION SERVICE,

Port of Honolulu, T. H., April 25, 1919.

Case of LAU AH LEONG, Applicant for Form  
430 Certificate as a Naturalized Citizen. C. I.  
1932.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Stenographer—MARTHA MULLHOLLAND.

Applicant sworn, testified: C. O. 1932, Green.

Q. What is your name and age?

A. Lau Ah Leong, 63 years old. (Family record on file.)

Q. Where were you born?

A. Chung Yun, China.

Q. Did you apply for a Form 430 certificate in March of this year? A. Yes.

Q. And your application was not considered because you did not show a sufficient reason for traveling to China, what is the purpose in your going to China now?

A. I have some shares in some of the stores at Shang Tow and also I am going to start a new company over there and then I want to buy some goods in Hongkong to send to Shang Tow and Honolulu.

Q. You stated that you were not going on business when you testified on March 13?

A. Because at that time the new company did not ask me to go but now it is necessary for me to go.

Q. Has anything arisen since that time that has made it necessary for you to go, that did not exist at that time?

A. They did not ask me to go before but this time they want me to go, they said I am an old merchant and know better than they.

Q. You are a naturalized citizen of Hawaii, are you? A. Yes.

Presents application for a passport and a certified copy of the naturalization record of L. Ah Leong, showing that L. Ah Leong was naturalized November 12, 1890.

Q. Who were the guarantors on your application for naturalization?

A. Jas. F. Morgan, Mr. Levy and L. Ah Low.

Q. When did you come to Hawaii?

A. In 1881.

Q. What has been your occupation since you came to Hawaii?

A. Working in a store at Kahala for four months.

Q. Then what?

A. I was the owner of a coffee saloon, general merchandise and grocery merchant.

Q. How long did you have the coffee saloon?

A. Three years.

Q. Where was the coffee saloon?

A. Kapaau, Kohala, Hawaii.

Q. Then what did you do?

A. Then I sold my business and came to Honolulu.

Q. When did you come to Honolulu?

A. In 1884.

Q. You been in Honolulu ever since?      A. Yes.

Q. What has been your occupation in Honolulu?      A. Grocery store in Honolulu.

Q. What else have you done besides engaging in the grocery business since you have been living in Honolulu?

A. I have been in the grocery ever since 1884.

Q. Have you any further statement to make?

A. No.

LAU AH LEONG. [156]

Form 591.

U. S. DEPARTMENT OF LABOR.

Immigration Service.      No. 4393/1

IMMIGRATION FILE:

Subject—LAU AH LEONG. [156a]

#4393/1.

LAU AH LEONG—Form 430—Nat. Cit.

4/29/19.

### STATEMENT BY INSPECTOR.

This applicant filed his application for a Form 430 certificate on February 4th, but when he came to make his statement on March 13th he stated that he was going to China merely on a pleasure trip and not for business. His application was, therefore, not considered, as he would not be entitled to a passport under the present regulations. He has not requested that his case be reopened and he claims that he is going on business. His former positive declaration that he intended to go abroad for pleasure only tends to weaken his claim that he is now going on business. On the other hand, it may be that his purpose was business in the first place and that he did not want to say so for fear he would have to reveal some of his business purposes. But as he has made his claim his case will be considered.

He is a man 63 years old and has been in Hawaii a great many years. I have known of him since some time in the 90's. He has always been in the grocery business and done a very large business, one of the largest and best known in Honolulu.

The records concerning him are as follows:

Record of his admission April 10, 1904, consisting of a bare statement that he was identified by Mr. Bayer and admitted.



Record of his admission January 6, 1911. At that time he was admitted solely on the strength of his certificate of identity, No. 1932, issued under the provisions of Bureau Circular No. 23. See, File No. 2302-C.

His admission January 18, 1916, also on his certificate of identity, there having been no investigation further than to identify him. 4393/1.

Applicant's statement of March 13, 1919, File No. 4393/1.

His statement of April 25, 1919. All the foregoing records cover one page.

File No. 1892-C, containing records of applicant's family, consisting of case of Lau Wong, ex SS. "China," Nov. 26, 1906, 4 pages and decision; case of Lau Ah Tung, ex SS. "Korea," Sept. 6, 1907, one page and decision; case of Chong Ah Ngo, ex SS. "Nippon Maru," Dec. 27, 1907, two pages and decision; affidavit of Lau Ah Wong, Oct. 31, 1907; case of Wong Ah Pin, ex SS. "Nippon Maru," Dec. 27, 1907, 4 pages and decision; affidavit of Lau Ah Tung, Oct. 31, 1907; cases of Hung Dai Kam, Lau Kong, Lau Chong, and Lau Yun Tai, ex SS. "Siberia," Jan. 6, 1910, 4 pages and decision; photographs of Lau Yun Tai, Lau Chong, Lau Ah Kong and Lau Tai Kam; case of Lau Yin Tai, ex SS. "Korea," Jan. 6, 1911, 6 pages and finding; affidavits of Young Chan, Young Sau Pong, and Chin Tai, June 28, 1910; petition to Secretary of Hawaii for birth certificate of Lau Yun Tai, June 28, 1910, and finding of Secretary; affidavits of Young Chan and Young Sau

Pong of June 28, 1910, petition to Secretary of Hawaii for birth certificate of Lau Kan Lum, June 28, 1910; finding of Secretary, June 30, 1910; case of Lau Yan Lum, ex SS. "Tenyo Maru," Dec. 30, 1910, 10 pages and finding; cases of Lau Ah Sung and Lau Kong, ex SS. "Sierra" from San Francisco, Aug. 18, 1913; photograph, of two young Chinese, a male and a female, name not on the same, but perhaps of Lau Chong and Wong Mun Sau.

#4393/1—LAU AH LEONG—Form 430—Nat.  
Cit. 4/29/19. [157]

#4393/1—LAU AH LEONG—Form 430—Nat.  
Cit. 4/29/19.

cases of Lau Chong and Wong Mun Sau, ex SS. "Manchuria," April 15, 1914, two pages and finding; photographs of Lau Yun Tai, Lau Chong and Hung Dai Kam; case of Albert A. Leong, investigated at the request of the San Francisco offices, 5 pages; cases of Lau Kong, *alias* Lau Ah Kong, ex SS. "Sonoma," from San Francisco, Aug. 9, 1915; case of Lau Ah Sung, ex SS. "Matsonia," from San Francisco, July 18, 1917, the last two containing one page each, the applicants having been admitted on identification as holders of certificates of identity.

From the fact that Lau Ah Leong, or L. Ah Leong as he is usually called, is so well known and from the other circumstances and the evidence, documentary and otherwise, I do not think there is much doubt that this applicant is the same person

who was naturalized as a citizen of the Hawaiian Kingdom in 1890.

EDWIN FARMER,  
Immigration Inspector.

#4393/1—LAU AH LEONG—Form 430—Nat.  
Cit. 4/29/19. [158]

U. S. IMMIGRATION SERVICE.

4393/1

Port of Honolulu, T. H., April 25, 1919.

Case of LAU AH LEONG, Applicant for Form  
430 Certificate as a Naturalized Citizen.  
C. I. 1932.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Stenographer—MARTHA MULLHOLLAND.

Applicant sworn, testified: C. O. 1932, Green.

Q. What is your name and age?

A. Lau Ah Leong, 63 years old. (Family record  
on file.)

Q. Where were you born?

A. Chung Yun, China.

Q. Did you apply for a Form 430 certificate in  
March of this year? A. Yes.

Q. And your application was not considered be-  
cause you did not show a sufficient reason for trav-  
eling to China, what is the *the* purpose in your  
going to China now?

A. I have some shares in some of the stores at  
Shang Tow and also I am going to start a new  
company over there and then I want to buy some  
goods in Hongkong to send to Shang Tow and  
Honolulu.

Q. You stated that you were not going on business when you testified on March 13?

A. Because at that time the new company did not ask me to go but now it is necessary for me to go.

Q. Has anything arisen since that time that has made it necessary for you to go, that did not exist at that time?

A. They did not ask me to go before but this time they want me to go, they said I am an old merchant and know better than they.

Q. You are a naturalized citizen of Hawaii, are you? A. Yes.

Presents application for a passport and a certified copy of the naturalization record of L. Ah Leong, showing that L. Ah Leong was naturalized November 12, 1890.

Q. Who were the guarantors on your application for naturalization?

A. Jas. F. Morgan, Mr. Levy and L. Ah Low.

Q. When did you come to Hawaii?

A. In 1881.

Q. What has been your occupation since you came to Hawaii?

A. Working in a store at Kahala for four months.

Q. Then what?

A. I was the owner of a coffee saloon, general merchandise and grocery merchant.

Q. How long did you have the coffee saloon?

A. Three years.

Q. Where was the coffee saloon?



A. Kapaau, Kohala, Hawaii.

Q. Then what did you do?

A. Then I sold my business and came to Honolulu.

Q. When did you come to Honolulu?

A. In 1884.

Q. You been in Honolulu ever since?

A. Yes.

Q. What has been your occupation in Honolulu?

A. Grocery store in Honolulu.

Q. What else have you done besides engaging in the grocery business since you have been living in Honolulu?

A. I have been in the grocery ever since 1884.

Q. Have you any further statement to make?

A. No.

LAU AH LEONG. [159]

#4393/1—LAU AH LEONG—Form 430—Nat.  
Cit. 4/29/19.

#### STATEMENT BY INSPECTOR.

This applicant filed his application for a Form 430 certificate on February 4th, but when he came to make his statement on March 13th he stated that he was going to China merely on a pleasure trip and not for business. His application was, therefore, not considered, as he would not be entitled to a passport under the present regulations. He has not requested that his case be reopened and he claims that he is going on business. His former positive declaration that he intended to go abroad for pleasure only tends to weaken his claim that he is now going on business. On the



other hand, it may be that his purpose was business in the first place and that he did not want to say so for fear he would have to reveal some of his business purposes. But as he has made his claim his case will be considered.

He is a man 63 years old and has been in Hawaii a great many years. I have known of him since some time in the 90's. He has always been in the grocery business and done a very large business, one of the largest and best known in Honolulu.

The records concerning him are as follows:

Record of his admission April 10, 1904, consisting of a bare statement that he was identified by Mr. Mayer and admitted.

Record of his admission January 6, 1911. At that time he was admitted solely on the strength of his certificate of identity, No. 1932, issued under the provisions of Bureau Circular No. 23. See, File No. 2302-C.

His admission January 18, 1916, also on his certificate of identity, there having been no investigation further than to identify him. 4393/1.

Applicant's statement of March 13, 1919. File No. 4393/1.

His statement of April 25, 1919. All the foregoing records cover one page.

File No. 1892-C, containing records of applicant's family, consisting of case of Lau Wong, ex SS. "China," Nov. 26, 1906, 4 pages and decision; case of Lau Ah Tung, ex SS. "Korea," Sept. 6, 1907, one page and decision; case of Chong Ah Ngo, ex SS. "Nippon," Dec. 27, 1907, two pages

and decision; affidavit of Lau Ah Wong, Oct. 31, 1907; case of Wong Ah Pin, ex SS. "Nippon," Dec. 27, 1907, 4 pages and decision; affidavit of Lau Ah Tung, Oct. 31, 1907; cases of Hung Dai Kam, Lau Kong, Lau Chong, and Lau Yun Tai, ex SS. "Siberia," Jan. 6, 1910, 4 pages and decision; photographs of Lau Yun Tai, Lau Chong, Lau Ah Kong and Lau Tai Kam; case of Lau Yin Tai, ex SS. "Korea," Jan. 6, 1911, 6 pages and finding; affidavits of Young Chan, Yaung Sau Pong, and Chin Tai, June 28, 1910; petition to Secretary of Hawaii for birth certificate of Lau Yun Tai, June 28, 1910, and finding of Secretary; affidavits of Young Chan and Young Sau Pong of June 28, 1910, petition to Secretary of Hawaii for birth certificate of Lau Kan Lum, June 28, 1910; finding of Secretary, June 30, 1910; case of Lau Yan Lum, ex SS. "Tenyo Maru," Dec. 30, 1910, 10 pages and finding; cases of Lau Ah Sung and Lau Kong, ex SS. "Sierra" from San Francisco, Aug. 18, 1913; photograph, of two young Chinese, a male and a female, name not on the same, but perhaps of Lau Chong and Wong Mun Sau.

#4393/1—LAU AH LEONG—Form 430—Nat.

Cit.

4/29/19. [160]

#4393/1. LAU AH LEONG—Form 430—Nat.

Cit.

4/29/19.

cases of Lau Chong and Wong Mun Sau, ex SS. "Manchuria," April 15, 1914, two pages and finding; photographs of Lau Yun Tai, Lau Chong and Hung Dia Kam; case of Albert A. Leong, investi-

gated at the request of the San Francisco offices, 5 pages; cases of Lau Kong, *alias* Lau Ah Kong, ex SS. "Sonoma," from San Francisco, Aug. 9, 1915; case of Lau Ah Sung, ex SS. "Matsonia," from San Francisco, July 18, 1917, the last two containing one page each, the applicants having been admitted on identification as holders of certificates of identity.

From the fact that Lau Ah Leong, or L. Ah Leong as he is usually called, is so well known and from the other circumstances and the evidence, documentary and otherwise, I do not think there is much doubt that this applicant is the same person who was naturalized as a citizen of the Hawaiian Kingdom in 1890.

EDWIN FARMER,

Immigrant Inspector.

#4393/1—LAU AH LEONG—Form 430—Nat.  
Cit. 4/29/19. [161]

U. S. IMMIGRATION SERVICE.

4393/1

Port of Honolulu, T. H., April 25, 1919.

Case of LAU AH LEONG, Applicant for Form  
430 Certificate as a Naturalized Citisen.  
C. I. 1932.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Stenographer—MARTHA MULLHOLLAND.

Applicant sworn, testified: C. O. 1932, Green.

Q. What is your name and age?

A. Lau Ah Leong, 63 years old. (Family record on file.)

Q. Where were you born?

A. Chung Yun, China.

Q. Did you apply for a Form 430 certificate in March of this year?     A. Yes.

Q. And your application was not considered because you did not show a sufficient reason for traveling to China, what is the *the* purpose in your going to China now?

A. I have some shares in some of the stores at Shang Tow and also I am going to start a new company over there and then I want to buy some goods in Hongkong to send to Shang Tow and Honolulu.

Q. You stated that you were not going on business when you testified on March 13?

A. Because at that time the new company did not ask me to go but now it is necessary for me to go.

Q. Has anything arisen since that time that has made it necessary for you to go, that did not exist at that time?

A. They did not ask me to go before but this time they want me to go, they said I am an old merchant and know better than they.

Q. You are a naturalized citizen of Hawaii, are you?     A. Yes.

Presents application for a passport and a certified copy of the naturalization record of L. Ah Leong, showing that L. Ah. Leong was naturalized November 12, 1890.

Q. Who were the guarantors on your application for naturalization?

A. Jas. F. Morgan, Mr. Levy and L. Ah Low.

Q. When did you come to Hawaii?

A. In 1881.

Q. What has been your occupation since you came to Hawaii?

A. Working in a store at Kahala for four months.

Q. Then what?

A. I was the owner of a coffee saloon, general merchandise and grocery merchant.

Q. How long did you have the coffee saloon?

A. Three years.

Q. Where was the coffee saloon?

A. Kapaau, Kohala, Hawaii.

Q. Then what did you do?

A. Then I sold my business and came to Honolulu.

Q. When did you come to Honolulu?

A. In 1884.

Q. You been in Honolulu ever since? A. Yes.

Q. What has been your occupation in Honolulu?

A. Grocery store in Honolulu.

Q. What else have you done besides engaging in the grocery business since you have been living in Honolulu?

A. I have been in the grocery ever since 1884.

Q. Have you any further statement to make?

A. No.



#4393/1. LAU AH LEONG—Form 430—Nat.  
Cit. 4/29/19.

### STATEMENT BY INSPECTOR.

This applicant filed his application for a Form 430 certificate on February 4th, but when he came to make his statement on March 13th he stated that he was going to China merely on a pleasure trip and not for business. His application was, therefore, not considered, as he would not be entitled to a passport under the present regulations. He has not requested that his case be reopened and he claims that he is going on business. His former positive declaration that he intended to go abroad for pleasure only tends to weaken his claim that he is now going on business. On the other hand, it may be that his purpose was business in the first place and that he did not want to say so for fear he would have to reveal some of his business purposes. But as he has made his claim his case will be considered.

He is a man 63 years old and has been in Hawaii a great many years. I have known of him since some time in the 90's. He has always been in the grocery business and done a very large business, one of the largest and best known in Honolulu.

The records concerning him are as follows:

Record of his admission April 10, 1904, consisting of a bare statement that he was identified by Mr. Bayer and admitted.

Record of his admission January 6, 1911. At that time he was admitted solely on the strength of his certificate of identity, No. 1932, issued under

the provisions of Bureau Circular No. 23. See, File No. 2302-C.

His admission January 18, 1916, also on his certificate of identity, there having been no investigation further than to identify him. 4393/1.

Applicant's statement of March 13, 1919, File No. 4393/1.

His statement of April 25, 1919. All the foregoing records cover one page.

File No. 1892-C, containing records of applicant's family, consisting of case of Lau Wong, ex SS. "China," Nov. 26, 1906, 4 pages and decision; case of Lau Ah Tung, ex SS. "Korea," Sept. 6, 1907, one page and decision; case of Chong Ah Ngo, ex SS. "Nippon Maru," Dec. 27, 1907, two pages and decision; affidavit of Lau Ah Wong, Oct. 31, 1907; case of Wong Ah Pin, ex SS. "Nippon Maru," Dec. 27, 1907, 4 pages and decision; affidavit of Lau Ah Tung, Oct. 31, 1907; cases of Hung Dai Kam, Lau Kong, Lau Chong, and Lau Yun Tai, ex SS. "Siberia," Jan. 6, 1910, 4 pages and decision; photograph of Lau Yun Tai, Lau Chong, Lau Ah Kong and Lau Tai Kam; case of Lau Yin Tai, ex SS. "Korea," Jan. 6, 1911, 6 pages and finding; affidavits of Young Chan, Young Sau Pong, and Chin Tai, June 28, 1910; petition to Secretary of Hawaii for birth certificate of Lau Yun Tai, June 28, 1910, and finding of Secretary; affidavits of Young Chan and Young Sau Pong of June 28, 1910, petition to Secretary of Hawaii for birth certificate of Lau Kan Lum, June 28, 1910; finding of Secretary, June 30, 1910; case of Lau Yan Lum,

ex SS. "Tenyo Maru," Dec. 30, 1910, 10 pages and finding; cases of Lau Ah Sung and Lau Kong, ex SS. "Sierra" from San Francisco, Aug. 18, 1913; photograph, of two young Chinese, a male and a female, name not on the same, but perhaps of Lau Chong and Wong Mun Sau.

#4393/1—LAU AH LEONG—Form 430—Nat.

Cit.

4/29/19. [163]

#4393/1. LAU AH LEONG—Form 430—Nat.

Cit.

4/29/19.

cases of Lau Chong and Wong Mun Sau, ex SS. "Manchuria," April 15, 1914, two pages and finding; photographs of Lau Yun Tai, Lau Chong and Hung Dia Kam; case of Albert A. Leong, investigated at the request of the San Francisco offices, 5 pages; cases of Lau Kong, *alias* Lau Ah Kong, ex SS. "Sonoma," from San Francisco, Aug. 9, 1915; case of Lau Ah Sung, ex SS. "Matsonia," from San Francisco, July 18, 1917, the last two containing one page each, the applicants having been admitted on identification as holders of certificates of identity.

From the fact that Lau Ah Leong, or L. Ah Leong as he is usually called, is so well known and from the other circumstances and the evidence, documentary and otherwise, I do not think there is much doubt that this applicant is the same person who was naturalized as a citizen of the Hawaiian Kingdom in 1890.

EDWIN FARMER,

Immigration Inspector.

#4393/1—LAU AH LEONG—Form 430—Nat.

Cit.

4/29/19. [164]

U. S. IMMIGRATION SERVICE.

No. 1892-C.

Port of Honolulu, T. H., Aug. 18, 1913.

Cases of LAU AH SUNG and LAU KONG, *alias* LAU AH KONG, ex SS. "Sierra" from San Francisco, Aug. 18, 1913.

FINDING.

Lau Ah Sung presents C. I. No. 1936 (green), issued by this office during the Hawaiian registration of Hawaiian born Chinese, and Lau Kong, *alias* Lau Ah Kong, presents C. I. No. 12423, issued by this office. (red) Both are satisfactorily identified as the rightful holders, and I recommend that they both be landed as Hawaiian Born.

EDWIN FARMER,

Imm. and Act. Chinese Inspector.

Approved.

RICHARD L. HALSEY,

Inspector-in-Charge.

On other side:

#1892—Chinese.

Adm. Aug. 18, 1913.

Lau Ah Sung.

Lau Kong (Lau Ah Kong).

Hawaiian Born. [165]

November 26, 1906.

Case of LAU WANG, ex S/S. "China," November 26, 1906, Alleged Hawaiian Born Person of Chinese Descent.

GEO. S. CURRY, Chinese Inspector.

TONG KAU, Chinese Interpreter.

(Chinese characters.)

Applicant, sworn, testifies:

Q. What is your name?     A. Lau Wong.

Q. How old are you?     A. 15 years old.

Q. What right have you to be admitted here now?     A. I was born here.

Q. What is the name of your father?

A. Lay Fut Leong.

Q. What is the name of your mother?

A. Ho She.

Q. Where are your parents?

A. Queen Street, Honolulu.

Q. What is your father's business?

A. He is a merchant, grocery store, the store name is L. Ah Leong.

Q. Have you any brothers or sisters?

A. Six brothers and one sister.

Q. Give me their names and ages?

A. Lau In, aged 22 or 23; Lau Dong, aged 17; Lau Kong, aged 13 or 14; Lau Jung, aged 11; Lau San, aged 8 or 9; Lau Chu, aged 7; Lau Bing, aged 5; Lau Chin, aged 3, all brothers, and sister Ella, Chinese name Kai Tai, aged 20.

Q. Where are all of your brothers?

A. Lau Dong and Lau Chin are in China, the rest are here.



Q. Where were all of your brothers and sister born?

A. Lau Chin born in China, the rest of them all born here.

Q. Have your mother and father been to China recently?

A. Father went to China with me, but I have another mother in China.

Q. Which is your own mother?

A. Ho She, the one here.

Q. How many wives has your father got altogether? A. 3.

Q. Give me the names of all of them?

A. 1st wife is Hung She, 2d one is Ho She, my own mother, and the third one is Wong She.

Q. Where are your father's wives?

A. Two are here and one is in China.

Q. Give me the names of the two who are here?

A. Hung She, the first one and Ho She, the second one.

Q. When did you go back to China?

A. In 1903.

Q. Give me the month, day and steamer?

A. "Siberia," I don't remember the month and day.

Q. Did you go back alone or did someone go with you?

A. My father with my brother Lau Dong went back to China together.

Q. And when did your father return here?

A. He returned here in 1904.

Q. While you were in China where did you live, what village?

A. Chung Non big town, Kew Boy, village.

Q. Are you married? A. Yes.

Q. What is the name of your wife, and where does she come from?

A. Her name is Chong She, she comes from Dung San village, aged 15.

Q. What did you do while you were in China, go to school? A. Yes. [166]

November 26, 1906.

Case of LAU WANG.

Applicant continued.

Q. Have you got any papers to show that you were born here?

A. I have only this paper (showing certificate of residence issued in his name, No. 7729, person other than a laborer, student).

Q. Did you come down to the Immigration before you went away to have your Hawaiian birth investigated? A. No.

Q. Do you know of anyone in Honolulu who can tell me about your being born here?

A. I do not know.

Q. Don't you know anyone here?

A. Yes, I know Lau Sau Chin, at the time I left here was a young boy, studied at St. Louis college, forget the name of my teacher.

SAU WAU.

GEO. S. CURRY,

Chinese Inspector, and Act'g Imm'g't Inspector.

Subscribed and sworn to before me this 26th day of November, A. D. 1906.

---

The foregoing testimony has been translated to the affiant by me, and before signing he had acknowledged that it is a correct record and that he fully understood the same.

TONG KAU,  
Chinese Interpreter.

GSC. [167]

November 26, 1906.

Case of LAU WONG.

(Chinese characters.)

Alleged father, sworn, testifies:

Q. What is your name? A. Lau Fut Leong.

Q. How old are you? A. 50.

Q. How long have you lived in the Hawaiian Islands? A. 28 or 29 years.

Q. Always made your home in Honolulu during that time? A. Yes.

Q. Where do you live now?

A. On Queen St., Honolulu.

Q. And what is your business?

A. I have a grocery store, on King St. L. Ah Leong is the name of the store.

Q. You are a married man? A. Yes.

Q. How many wives have you? A. 3.

Q. Are your wives all living? A. Yes.

Q. Give me their names?

A. Hung She, is the first wife, second one Ho She, and the third one is Wong She.

Q. Where are your wives living now?

A. Ho She and Hung She are here; the other one is in China.

Q. What is the name of your native village in China? A. Chung Non, Kew Boy village.

Q. How many children have you?

A. Ten altogether, nine boys and 2 girls, makes 11 children in all.

Q. Give me the names and ages of all of your children?

A. Lau Yin, about 21 years old; Lau Dong, aged 17; Lau Wang, aged 15, justing coming here; Lau Kong, aged about 12; Lau Jung, aged about 10; Lau San, aged about 9, Lau Chu, aged 7; Lau Bing, aged 4 or 5; Lau Chin, aged 3, boys, and girls, Amoy 18 or 19 years old, English name Ella; and another one named Amoy, born last year.

Q. Where were all of your children born?

A. All born here with the exception of Ah Chin.

Q. Where was Ah Chin born? A. In China.

Q. Where are all of your children now?

A. Three are in China, one coming back now, rest are all here.

Q. Give me the names of the three in China?

A. Lau Wang, Lau Dong, and Lau Chin.

Q. Give me the name of the one who is coming here now? A. Lau Wang.

Q. How long has Hung Shee been in these Islands? A. She has been here 22 or 23 years.

Q. How long has your wife Ho She been here?

A. 18 or 19 years.

Q. Have either of your wives ever been back to China since you first came here? A. No.

Q. When did your son Lau Wang go to China?

A. June 1, 1903.

Q. What steamer? A. "Siberia."

Q. Did he go there alone at that time?

A. No, myself, and his brother Lau Dong went there together.

Q. When did you return here?

A. March 11, 1904.

Q. What kind of a paper did you have to return on?

A. I have a naturalization certificate under the Hawaiian Kingdom. [168]

November 26, 1906.

Case of LAU WONG.

Alleged father continued.

Q. Who is there in Honolulu who knows about your son Lau Wang, and knows that he was born here, and is your son?

A. Chu Gem, and C. K. Ai.

Q. Was 1903, the first time Lau Wang had ever been in China? A. Yes.

Q. Is he married? A. Yes.

Q. What is the name of his wife?

A. Chong She, from Dung San.

Q. Has your son Lau Wang got any papers to show that he was born in Hawaii?

A. Yes, I gave to him.

Q. What was it you gave to him?

A. He has a Hawaiian birth certificate.

LAU AH LEONG.

GEO. S. CURRY,

Chinese Inspector and Act'g Immig't Inspector.



Subscribed and sworn to before me this 26th day of November, A. D. 1906.

---

The foregoing testimony has been translated to the affiant by me and before signing he has acknowledged that it is a correct record and that he fully understood the same.

TONG KAU,  
Chinese Interpreter.

GSC. [169]

November 26, 1906.

Case of LAU WANG.

#### DECISION.

The father of this applicant, L. Ah Leong, presents as evidence of his citizenship naturalization certificate issued in the name of L. Ah Leong, under the Hawaiian Kingdom, date of naturalization November 12, 1890, signed by C. N. Spencer, Minister of the Interior. It may be added here that there is no doubt as to Mr. Lau Leong's mercantile status. Testimony of father and son in this case is corroborative, the one of the other, and when brought together their actions prove beyond a question of a doubt the relationship claimed. Mr. C. K. Ai also appeared in this office and identified the applicant, Lau Wang, as being the son of L. Ah Leong born in Honolulu. The boy speaks fair English, and shows considerable knowledge of Honolulu, and its surroundings. I have no doubt of the *bona fide* character of the claims advanced by applicant, and therefore recommend his admission

as Hawaiian born and as the minor son of a naturalized citizen of the United States.

GEO. S. CURRY,

Chinese Inspector and Act'g Immg't Inspector.

Approved:

RAYMOND C. BROWN,

Acting Chinese Inspector-in-Charge.

GSC. [170]

U. S. DEPARTMENT OF LABOR.

Immigration Service.

CT.

14244/6-2.

Office of Commissioner

Angel Island Station

via Ferry Post Office

San Francisco, Cal.

June 4, 1915.

Inspector-in-Charge,

Immigration Service,

Honolulu, Hawaii.

Referring to your file No. 1892-C, I have to report the following disposition of the case of the Chinese Albert A. Leong, who arrived at this port on the SS. "Wilhelmina," March 30, 1915:

Admitted June 3.

The photographs which accompanied your letter of April 29 are herewith returned.

SAMUEL W. BACKUS,

Commissioner.

CT-WDS.

Inc. 34890. [171]

April 29th, 1915.

No. 1892-C.

Commissioner of Immigration,

San Francisco, California.

(Angel Island, via Ferry P. O.)

The records transmitted with your letter of April 6th, 1915, your file No. 14244/6-2, in re Albert A. Leong, alleged native of Hawaii, are returned herewith, together with a transcript, in triplicate of the testimony taken by Inspector Miligan in his examination of the case.

From a consideration of the testimony taken at this time, the records contained in this office concerning the immediate members of applicant's family, and all the circumstances of the case, I am satisfied that applicant Albert A. Leong, *alias* Lau Ah Yin, was born in Hawaii as claimed.

The attached photographs of applicant's mother Hung Dia Kam, his brothers Lau Ah Kong, Lau Ah Chung, and his sister Lau Yun Tai, should be returned to this office when they have served their purpose.

(Sgd.) R. L. HALSEY,  
Inspector-in-Charge.

Mailed 4-29-15.

RLH/JLM. [172]

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Office of the Commissioner

Angel Island Station

via Ferry Post Office

San Francisco, Cal.

April 6, 1915.

In Answering Refer to

No. 14244/6-2.

Inspector-in-Charge,

Immigration Service,

Honolulu, T. H.

There is inclosed herewith our record in the case of Albert A. Leong, alleged native of Hawaii, ex SS. "Wilhelmina," March 30, 1915.

A record of the former admission of this applicant, ex SS. "Sildra," March 31, 1907, is also inclosed, from which it appears that at that time admission was granted him merely upon the basis of his Hawaiian birth certificate.

On March 30th a detailed statement was secured from the applicant (transcript inclosed), in which you will note he gives the names of the members of his family and other witnesses in Honolulu who can testify as to his Hawaiian birth. Kindly conduct an investigation on that basis, and furnish this office with transcript in triplicate.

The applicant has been released from this station on parole pending final disposition of his case.

SAMUEL W. BACKUS,

Commissioner.

CT.

WDS.

Inc. 34751. [173]

UNITED STATES IMMIGRATION SERVICE.  
No. 1892-C.

Case of LAU AH SUNG, ex SS. "Matsonia" from  
S. F. July 18, 1917.

Port of Honolulu, T. H., July 18th, 1917.

FINDING.

This applicant, male, presents certificate of identity No. 1936, "green," showing that his Hawaiian birth has already been established, and is identified as the rightful holder of same. It is recommended that he be admitted.

JACKSON L. MILLIGAN,

Immigrant & Act'g Chinese Inspector.

Approved.

RICHARD L. HALSEY,

Inspector-in-Charge. [174]

UNITED STATES IMMIGRATION SERVICE.  
CHINESE DIVISION.

No. 1892-C.

Case of LAU KONG, *alias* LAU AH KONG, ex  
SS. "Sonoma" from San Francisco, August  
9th, 1915.

Port of Honolulu, T. H., August 9th, 1915.

FINDING.

This applicant, male, presents certificate of identity No. 12423, pink, and is identified as the rightful holder of same. This certificate shows that his status at Hawaiian born has already been established, and I recommend that he be admitted.

JACKSON L. MILLIGAN,

Immigrant & Act'g Chinese Inspector.



Approved.

HENRY B. BROWN,  
Acting Inspector-in-Charge. [175]  
DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

Port of Honolulu, T. H., April 16, 1915.

Case of ALBERT A. LEONG, Alleged Native of  
Hawaii. San Francisco File 14244/6-2, For-  
warded to Honolulu Office for Investigation.

JACKSON L. MILLIGAN, Inspector.

CHUCK HOY, Interpreter.

MYRVEN H. SIDES, Stenographer.

Witness, sworn, testifies: (Naturalized citizen  
of U. S.)

Q. What are your names?

A. Lau Ah Leong, other name Lau Fat Leong.

Q. How old are you? A. Fifty-nine years old.

Q. How many years have you been in Hawaii?

A. Since KS. 6 (1880).

Q. What is your occupation?

A. Merchant, sole owner of L. Ah Leong store.

Q. Where is this store?

A. King Street, near Maunakea.

Q. How many times have you been married?

A. Three times.

Q. What is the name of your first wife?

A. Hung She.

Q. Is she living?

A. Yes, she is here in Honolulu.

Q. When did you marry her?

A. I married her when I was twenty-eight years  
old.

Q. Where did you marry her?

A. In Kohala, Hawaii.

Q. How many children have you by her?

A. Four sons and three daughters by her.

Q. Give the names and ages of the sons.

A. Lau Wah Yin, other name Albert Ah Leong, about thirty years old; Lau Ah Dung, I do not know how old he is; Lau Ah Kong, about twenty years old; Lau Ah Chung, I do not remember his age.

Q. Give the names of the daughters.

A. Lau Ah Moy, she is married to Senz Chun Fook, other name C. F. Senz, and is living in Honolulu, she has another name but I do not know it; I do not know the name of the next one, she was adopted by Lau Lan Siu; I do not know the name of the other daughter.

Q. Has Lau Yin ever made a trip to China?

A. No.

Q. Where is he now?

A. He is in San Francisco now.

Q. Has he been in Hawaii lately?

A. Yes, just a week or two ago.

Q. When did he come back from the States before?

A. He came back here a few months ago from the States.

Q. When did he first go to the mainland of the United States?      A. I do not know.

Q. Are you good friends with him?

A. He is my oldest son.

Q. Is he married?      A. Yes.

Q. To whom is he married?

A. Daughter of Ching Chew Yee, I do not know her name.

Q. When did he marry?

A. 1899 or 1900; I do not remember, it was quite long ago.

Q. Where is his wife living?

A. She lived in Honolulu, but they are divorced. She is married again to one of C. Q. Yee Hop's men in Honolulu.

Q. Has your second son, Lau Dung, ever made a trip to China?

A. Yes, I took him to China. [176]

4/16-15

Case of ALBERT A. LEONG, Alleged Native of Hawaii. San Francisco File 14244/6-2, Forwarded to Honolulu Office for Investigation.

Witness, LAU AH LEONG (continued).

(Records show that Lau Dung returned to Hawaii and was admitted Sept. 6, 1907, as Hawaiian born.)

Q. Has Lau Kong ever made a trip to China?

A. Yes.

(Records show that Lau Kong returned and was admitted Jan. 7, 1910, as Hawaiian born.)

Q. Has Lau Chung ever made a trip to China?

A. Yes, he made two trips.

(Records show Lau Chong was admitted at this port Jan. 7, 1910, as Hawaiian born.)

(Note: In the testimony taken in the cases above mentioned the name of Lau Yin or Albert Ah Leong was mentioned as the oldest son of Lau Fat Leong.)

Q. Where was Lau Yin born?

A. Nuuanu St., Honolulu.

Q. You say that you married Hung She at Kohala, Hawaii. How long did you live there before you returned to Honolulu? A. A few months.

Q. How long after you arrived in Honolulu was Lau Yin born? A. I do not remember that.

Q. Who is there in Honolulu who can testify as to his Hawaiian birth?

A. C. K. Ai and Chu Gem. I do not remember any others.

Q. Is your wife Hung She able to testify?

A. Yes.

Q. Whose photograph is this? (Showing witness picture of Hung She.) A. My wife, Hung She.

Q. Whose photograph is this? (Showing witness picture of Lau Kong.)

A. This looks like my son Lau Ah Yin.

(Witness complains that he cannot see very well without glasses.)

Q. Whose photograph is this? (Showing witness picture of Lau Chung.) A. Lau Ah Chung.

Q. Whose photograph is this? (Showing witness photograph of Lau Yun Tai.)

A. It is my daughter who is in school now but I do not know her name.

Q. Is that your youngest daughter by Hung She?

A. Yes.

Q. How is it that you are not able to give the date of your son Lau Yin's first departure for the mainland?

A. Because he is a bad boy. He took some money

away so I did not bother him very much. He had a law suit against me about some property.

Q. Can you recognize this photograph? (Showing witness photograph of Lau Yin on Hawaiian birth certificate.) A. It is Lau Yin.

Q. Whose photograph is this? (Showing picture of Lau Yin taken recently.) A. It is Lau Yin.

Q. Is there any further statement you wish to make? A. No.

Notes signed by witness in English:

“L. AH LEONG.”

I hereby certify as to the correctness of the foregoing transcript.

MYRWEN H. SIDES,  
Stenographer. [177]

Case of ALBERT A. LEONG, Alleged Native of Hawaii. San Francisco File 14244/6-2, Forwarded to Honolulu Office of Investigation.

Port of Honolulu, T. H., April 28th, 1915.

JACKSON L. MILLIGAN, Inspector.

CHUCK HOY, Interpreter.

Witness (alleged mother) sworn, testifies:

Q. What is your name?

A. Hung Shee or Hung Dai Kam, age 48.

Q. Where were you born?

A. Sum Chun village, Sun On District, China.

Q. When did you first come to Hawaii?

A. When I was 17 years old.

Q. What is the name of your husband?

A. Lau Ah Leong or Lau Fat Leong.

Q. When were you married to him?

A. When I was 17 years old, at Kohala, Hawaii.



Q. How long after you came here?

A. A little over a month.

Q. How many children have you?

A. Four sons and three daughters living, and five sons and one daughter died.

Q. What are the names of your four sons?

A. Lau Ah Yin, or Albert A. Leong, age 30; Lau Dung, age 26; Lau Kong, age 20; Lau Chong, age 19.

Q. Where was Lau Ah Yin born?

A. On Nuuanu Street, Honolulu.

Q. Where were your other children born?

A. All in Honolulu.

Q. What are the names of your daughters?

A. Lau Quai Tai, age 28, married to Zane Chong Fook, living in Honolulu; Lau Lin Tai, age 10; Lau Mew Lin, adopted to Lau Ngau Sau's family.

Q. Have you ever made a trip to China since you first came to Hawaii?

A. Yes, once, about 9 years ago, returning about three years later. (Records show that Hung Dai Kam, Lau Kong, Lau Chong, and Lau Yun Tai arrived SS. "Siberia," January 6th, 1910, the first admitted as the wife of a merchant and the others as Hawaiian born.)

Q. How many of your children have made a trip to China?

A. All except my oldest son Lau Ah Yin, and my oldest daughter Lau Quai Tai.

Q. Where is Lau Yin now?

A. In San Francisco.

Q. When did he go to San Francisco?

A. Over a month ago.

Q. Was he ever in San Francisco before that?

A. Yes.

Q. When did he go there the first time?

A. About eight years ago, while I was in China.

Q. Is he married?

A. He was married, but divorced now.

Q. Who is there in Hawaii that knows your son Lau Yin was born here?

A. Many people knows, but I can't remember their names; my husband knows about them.

Q. Any further statement you wish to make?

A. No.

(Signed by cross) HUNG SHEE.

Witness sworn, testifies: (Naturalized citizen.)

Q. What are your names?

A. Ho Leong, *alias* Ho Sing Yow, age 57.

Q. When did you first come to Hawaii?

A. 39 years ago.

Q. Do you know a man named Lau Fat Leong?

A. Yes.

Q. How long have you known him?

A. Over 30 years.

Q. So you know his wife? A. Yes.

Q. What is her name?

A. I used to know her name but can't remember it just now; our families have been well acquainted for years.

Q. When did you first meet Lau Fat Leong?

Case of ALBERT A. LEONG, Alleged Native of Hawaii. San Francisco File No. 14244/6-2, Forwarded to Honolulu Office for Investigation.

Witness HO LEONG (continued).

A. I knew him when he first came to Hawaii, before he went to Kohala, and I was afterwards book-keeper at the Lau Ah Lo store on Nuuanu Street when he was in business at Kohala.

Q. When you knew him before he went to Kohala was he married?

A. No, he was married at Kohala, then on account of business being no good he came to Honolulu shortly after he was married, and worked in the Lau Ah Lo store, and we lived in the same house on Nuuanu Street.

Q. When he came to Honolulu from Kohala did he have any children?     A. No.

Q. Did they have any children born in Honolulu?

A. I know the oldest son Lau Ah Yin was born on Nuuanu Street near Vineyard Street.

Q. How long after he returned to Honolulu was this boy born?     A. A few months after.

Q. Has Lau Fat Leong any other children?

A. Yes, many children living and a number that died. They were all born in Honolulu.

Q. Did this oldest boy Ah Yin ever make a trip to China?

A. I don't know, but I don't think he did.

Q. Where is he now.

A. I don't know where he is; I haven't seen him

for quite a long time; I heard he went to San Francisco some time ago.

Q. Was he married?

A. Yes, he was, but divorced later.

Q. You say you was working with Lau Fat Leong when this boy was born?

A. Yes, and saw him right along when he was a baby.

Q. Has he a good character as far as you know?

A. I don't know much about his character; I saw him often when he was young, but when he got older I had no dealings with him, but I heard he didn't obey his father at all and they had some trouble.

Q. Do you know how many children Lau Fat Leong has?

A. I know he has been married two or three times and has a lot of children, I don't know how many.

Q. Any further statement you wish to make?

A. No.

(Signed) HO LEONG. [179]

Case of ALBERT A. LEONG, Alleged Native of Hawaii. San Francisco File No. 14244/6-2, Forwarded to Honolulu Office for Investigation.

Port of Honolulu, T. H., April 29th, 1915.

#### MEMORANDUM TO INSPECTOR-IN-CHARGE.

Applicant Albert A. Leong, Chinese name Lau Ah Yin, appeared in this office about three months ago and requested that his status be investigated. A time was set for the hearing, and he was told to have his witnesses present at that time. He did

not appear on the date set for hearing, but came to the office alone later and stated that owing to bad feeling between his parents and himself he did not like to bring them as witnesses, but would try to get other witnesses. Nothing more was heard in regard to him until the case was forwarded from San Francisco for investigation.

I have talked to a number of Chinese who are in a position to know the facts, but owing to the bad standing of applicant in this community they did not wish to testify.

A search of the records of this office reveals the fact that applicant's alleged father Lau Ah Leong, *alias* Lau Fat Leong, his alleged mother Hung Shee, *alias* Hung Dai Kam, and a number of his brothers and sisters and half-brothers have made visits to China. The brothers and sisters have, without exception, been admitted as Hawaiian born Chinese, and in the testimony taken in the various cases applicant Lau Ah Yin, or Albert A. Leong, was mentioned as the oldest son of L. Ah Leong, and the statement made that he was born in Honolulu.

Attached is the testimony taken at this time, also photographs of applicant's alleged mother Hung Dai Kam, alleged brothers Lau Ah Kong and Lau Ah Chung, and his alleged sister Lau Yun Tai. The photographs should be returned when they have served their purpose.

JACKSON L. MILLIGAN,  
Immigrant & Act'g Chinese Inspector. [180]



PHOTOGRAPHS OF:

HUNG DAI KIM.

LAU KONG.

LAU CHONG.

LAU YUN TAI. [181]

CHINESE DIVISION.

UNITED STATES IMMIGRATION SERVICE.

No. 1892-C.

Cases of LAU CHONG, HK 1-1, and WONG MUN  
SAU, HK. 1-2, ex SS. "Manchuria," April  
15th, 1914.—Native and Alleged Wife.

Port of Honolulu, T. H., April 16th, 1914.

HARRY B. BROWN, Inspector.

TONG KAU, Interpreter.

J. L. MILLIGAN, Stenographer.

Applicant LAU CHONG sworn, testifies:

(Presents certificate of identity No. 12424

"Pink.")

Q. What are your names?

A. Lau Ah Chung, *alias* Lau Dat Chong.

Q. How old are you? A. 19, Chinese count.

Q. Where were you born? A. Honolulu.

Q. Who are you traveling with?

A. My wife Wong Mun Sau.

Q. How old is she? A. 19, Chinese count.

Q. When were you married?

A. Tenth month, twelfth day, last year.

Q. Where was your wife born?

A. Chung Yun, Hing Chow, Canton, China.

Q. Where have you been living since you were  
married? A. Same place.

Q. Have you been married before *hits*?

A. No.

Q. When did you go to China this time?

A. June 28th last year SS. "China."

Q. Are your parents in Hawaii? A. Yes.

Q. Have you anything to show that you are married to this woman? A. Yes.

(Presents certificate of marriage in Chinese, Lau Dat Chung, born in Bung Sun, 8th month, 11th day (Sept. 17, 1896), father Lau Fat Leong, mother Lau Hung Shee, of Chung Yin, Kwong Tung Province, Canton, to marry Wong Mun Sau, born in Bung Sun 8th month 15th day (Sept. 21, 1896), father Wong Hen.Nom, mother Wong Shee, from Chung Yin, Canton, dated October 12th, C. R. 2; go-between Wong Chung Gew, Witness Lau Ngee and Wong Yum.)

Q. Is there anybody in Hawaii who was present at your wedding?

A. No, but my mother knew my wife before I married her.

Q. How long were you engaged to this girl?

A. Since I was 15 years old.

Q. What family have you in China now?

A. My father's No. 2 wife and two sons.

Q. Is that all that is living there?

A. Also my father's third wife in China and the man who takes care of our house, Wong Yum. My father's No. 2 wife has one son and his No. 3 wife has one son.

Q. Any further statement you wish to make?

A. No.

Q. Please sign the notes.

(Signed in English) LAU AH CHONG.

Applicant WONG MUN SAU sworn, testifies:

Q. What is your name? A. Wong Mun Sau.

Q. How old are you? A. 19.

Q. Who are you traveling with?

A. My husband.

Q. What is his name? A. Lau Ah Chong.

Q. How old is he? A. 19.

Q. What is his married name?

A. Lau Dat Chong.

Q. When were you married?

A. Tenth month 12th day last year.

Q. Where were you born?

A. Chung Yun, Hing Chow, Canton, China.

Q. What is your husband's village in China?

A. Kow Boy.

Q. Where have you been living since you married your husband? A. My own village.

Q. Where was your husband born?

A. In Honolulu.

Q. Where are his parents?

A. In Honolulu. [182]

Cases of LAU CHONG and WONG MUN SAU,  
ex. SS. "Manchuria," April 15, 1914.

Statement of applicant WONG MUN SAU continued.

Q. What is the name of your father?

A. Wong Jow Nom.

Q. What is the name of your husband's father?

A. Lau Fat Leung.

Q. Was your husband married before he married you? A. No.

Q. When were you engaged to him?

A. When I was 15 years old.

Q. Who is living in your father-in-law's house in China at the present time?

A. His No. 2 and No. 3 wife and two sons and a manager, Wong Yum.

Q. Is that your marriage certificate? (Pointing to certificate presented by alleged husband.)

A. Yes.

Q. Is Lau Ah Chong your lawful husband?

A. Yes.

Q. Is there anyone in Hawaii whom you know and whom you have seen since you were married.

A. No.

Q. Any further statement you wish to make?

A. No.

(Signed in Chinese.)

(WONG MUN SUA.)

Chinese Characters. [183]

No. 1892-C.

Cases of LAU CHONG and WONG MUN SAU,  
ex S/S "Manchuria," April 15, 1914.

Honolulu, T. H., April 16th, 1914.

#### FINDING.

The applicant Lau Chong presents certificate of identity, and is identified as the rightful holder of same, which shows that he is Hawaiian born. From the testimony offered at this time and the marriage certificate presented I am of the opinion that the applicant Wong Mun Sau is the lawful wife of Lau Chong.

I recommend that he be admitted as a native with a record of departure, and that she be admitted as the wife of a native.

HARRY B. BROWN,  
Immigrant Inspector.

Approved.

RICHARD L. HALSEY,  
Inspector-in-Charge.

HBB/JLM. [184]

A PICTURE OF CHINESE BOY AND GIRL.  
[185]

U. S. IMMIGRATION SERVICE.

No. 1892-C.

Port of Honolulu, T. H., Aug. 18, 1913.

Cases of LAU AH SUNG and LAU KONG, *alias*  
LAU AH KONG, ex SS. "Sierra" from San  
Francisco, Aug. 18, 1913.

FINDING.

Lau Ah Sung presents C. I. No. 1936 (green), issued by this office during the Hawaiian registration of Hawaiian-born Chinese, and Lau Kong, *alias* Lau Ah Kong, presents C. I. No. 12423, issued by this office (red). Both are satisfactorily identified as the rightful holders, and I recommend that they both be landed as HAWAIIAN BORN.

EDWIN FARMER,  
Imm. and Act. Chinese Inspector.



Approved.

RICHARD L. HALSEY,  
Inspector-in-Charge.

On back:

Adm. Aug. 18, 1913.

Lau Ah Sung.

Lau Kong (Lau Ah Kong).

Hawaiian born. [186]

54624.

---

211

No. 1892.  
CHINESE.

PHOTOGRAPHS OF THE FOLLOWING:

HUNG DAI KAM (2).

LAU AH KONG (2).

LAU CHUNG (2).

LAU YUN TAI (2). [216]

January 7, 1910.

Cases of HUNG DAI KAM, Wife of Merchant and Citizen; LAU KONG, LAU CHONG and LAU YUN TAI, Hawaiian Born, ex S/S. "SIBERIA" 1/6/10.

PRESENTS: No papers for wife; board of health certificate for Lau Yun Tai; Hawaiian birth certificate #549, Lau Ah Kong, and #542, Lau Ah Chong, issued by Henry E. Cooper, Secretary of

Territory of Hawaii, June 24, 1901. Picture attached to each Hawaiian birth cert.

GEO. S. CURRY, Chinese Inspector.

TONG KAU, Chinese Interpreter.

Applicant HUNG DAI KAM, sworn, testifies:

Q. What is your name? A. Hung Dai Kam.

Q. How old are you? A. 42 years old.

Q. Have you ever been in Hawaiian Islands before?

A. Yes, came here,—I have been here 24 years.

Q. When did you return to China last time?

A. January, 1907.

Q. Did you ever make any other visits to China?

A. No.

Q. When you were here, where did you live?

A. Honolulu all of the time.

Q. Are you married? A. Yes.

Q. What is the name of your native village?

A. Sum Jun.

Q. What is the name of your husband?

A. Lau Fat Leong.

Q. When were you married to him?

A. When I was 17 years old.

Q. What is 25 years ago? A. Yes.

Q. Where were you and he at the time of the marriage? A. Kohala, Hawaiian Islands.

Q. How long did you come here before you were married to him? A. One month.

Q. How were you married?

A. Chinese marriage.

Q. How many children did you have, born by him?

A. Eight children, four boys and four girls, kept two girls, and gave two away.

Q. Give me their names and ages, and where they are now?

A. Lau Yin, boy, aged 24, gone to mainland of U. S. Lau Kai Tai, or Lau Moy, girl, aged 22, Honolulu. Lau—girl gave away. Lau Dung, boy, aged 19; Honolulu. Lau Kong, boy, aged 14, coming here with me. Lau Chong, boy, aged 13, coming here with me. Lau Yun Tai, girl, aged 4, here with me. Another girl gave away.

Q. Are you the first and lawful wife of Lau Fat Leong? A. Yes.

A. Has your husband any other wives?

A. Yes, but not lawful wife.

Q. Are you sure that you are the first wife.

A. Yes.

Q. Has your husband any wives in Hawaiian Islands now? A. Yes.

Q. How many? A. One.

Q. What is her name? A. Ho She, 35.

Q. When did she come to Hawaiian Islands?

A. 18 years ago.

Q. What number wife is she? A. #2.

Q. How many more wives has your husband?

A. #3 named Chung She, died here, died in 1906.

Q. How many more? A. One in China.

Q. What is the name and age?

A. Wong She, aged 31.

Q. Has she been here? A. No.

Q. When was he married to her?

A. Seven years ago. Several years ago my husband went to China to put up a new house, and he married her, and put her in charge of the house, to take care of it, because all of the family here.

Q. Hasn't your husband any other wives whom he sent to China several years ago? A. No.  
[217]

January 7, 1910.

Case of HUNG DAI KAM, and Children of LAU  
FAT LEONG.

Applicant continued.

Q. Hasn't your husband any other wives here?

A. No.

Q. You have told me all now? A. Yes.

Q. Has your husband any children by any of these other wives? A. Yes.

Q. Tell me how many by each one?

A. No. 2 wife, five children; do not remember their names, they are all here.

Q. Any by No. 3 wife?

A. She had two girls, but gave away.

Q. How about the wife in China, any children by her? A. Yes, one boy.

Q. These children you bring here with you, where were they born? A. All born here.

Q. When did they go to China?

A. January, 1907.

Q. Was that the first time that any of them had ever been to China? A. Yes, first time.

Q. Are any of your children married?

A. Yes, old boy and old daughter married. Laun Yin was married, but he is divorced, and Lau

Dung, boy, is also married, his wife came here 2 years ago.

Q. Who is Lau Wong?

A. Is boy of No. 2 wife.

Q. Is he married or single?

A. He is also married, wife came here 2 years ago.

Q. What is the name of your husband's village in China? A. Chung Nin, Kah Hing Chow.

Q. I thought it was Chung Non, Kew Boy?

A. Chung Nin, Kew Boy.

A. Have you any further statement to make?

A. No.

HUNG DAI KAM.

her

X

mark.

Subscribed and sworn to before me this 7th day of January, A. D. 1910,

GEO. S. CURRY,

Chinese Inspector, and Act'g Immgr't Inspector.

The foregoing testimony has been translated to the affiant by me, and before signing she has acknowledged that it is a correct record, and that she fully understood the same.

TONG KAU,

Interpreter.

GSC. [218]

January 7, 1910.

Case of HUNG DAI KAM, and Children.

Witness, husband and father, sworn, testifies:

Q. What is your name?



A. Lau Fat Leong, also known as L. Ah Leong.

Q. How long have you been in the Hawaiian Islands? A. About 30 years.

Q. When did you return here from China last time? A. I returned here in 1904.

Q. Month, and steamer?

A. March, S/S. "Gaelic."

Q. What kind of a paper did you have then?

A. Naturalized citizen.

Q. Did you come alone then, or did you bring someone with you? A. Only myself.

Q. You come here to be a witness for whom to-day?

A. Witness for my wife, two boys, and one girl.

Q. Give me their names?

A. Wife, Hung She, and children, Lau Kong, Lau Chong, and Lau—daughter, forget the name.

Q. Forget the name of your own daughter?

A. Yes.

Q. Lau Yun Tai?

A. I forget, always call Ah Moy.

Q. How old is Hung She?

A. I forget her age.

Q. Well, 15 years old, or 65?

A. I think 37 years old.

Q. How old are you? A. 52.

Q. She is younger than you? A. Yes.

Q. Is this your lawful wife? A. Yes.

Q. Has she ever been here before?

A. Yes, she returned to China.

Q. When did she first come here, and when did she return to China?

A. She came here in 1884, and returned to China in I think 1906.

Q. Have you any other wives here?

A. Yes, one more here.

Q. What is her name?      A. Ho She.

Q. Well, which is your lawful wife?

A. Hung She.

Q. Ho She is not your lawful wife then?

A. Second wife.

Q. Have you ever been divorced from Hung She?      A. No.

Q. These children here, by whom were they born?

A. Hung She.

Q. Have you any further statement to make?

A. No.

Q. Where were these children born?

A. All born here.

L. AH LEONG,

Subscribed and sworn to before me this 7th day of January, A. D. 1910.

GEO. S. CURRY,

Chinese Inspector, and Act'g Imm'g't Inspector.

The foregoing testimony has been translated to the affiant by me, and before signing he has acknowledged that it is a correct record and that he fully understood the same.

TONG KAU,  
Interpreter.

January 7, 1910.

Case of HUNG DAI KAM and Children.

Husband and father continued.

Q. What is your name? A. Lau Fat Leong.

Q. Where were you married to Hung She?

A. Kohala, Hawaii.

Q. Have you ever been divorced from Hung She? A. No.

Q. When did Ho She come to the Hawaiian Islands?

A. It was some years after I married Hung She.

Q. When were you married to Ho She?

A. After she came here.

Q. Which woman do you consider to be your lawful wife? A. Hung She.

Q. She is the first woman you were married to, and you have never been divorced? A. No.

Q. After you were married to Hung She, did you live with her as her husband, and hold her out to the community as your lawful wife? A. Yes.

Q. That was before you were married to Ho She?  
A. Yes.

L. AH LEONG,

Subscribed and sworn to before me this 7th day of January, A. D. 1910.

GEO. S. CURRY,

Chinese Inspector and Act'g Immgr't. Inspector.

The foregoing testimony has been translated to the affiant by me, and before signing he has ac-

knowledgeed that it is a correct record, and that he fully understood the same.

TONG KAU,  
Interpreter.

GSC. [220]

January 7, 1910.

Cases of HUNG DAI KAM, Wife of Citizen, Lau Kong, Lau Chong, and Lau Yun Tai, Hawaiian Born.

#### DECISION.

Applicants are all identified by, and identify Lau Fat Leong. Applicants are also identified by Chinese Interpreter Tong Kau. Mr. Tong Kau identifies the woman Hung She (Hung Dai Kam) as the lawful wife of L. Ah Leong.

Hung She and Lau Fat Leong according to their statements were married at Kohala, on the Island of Hawaii, Hawaiian Islands, a number of years ago. It also appears to be established, beyond any doubt, that neither Hung She nor L. Ah Leong had at that time or ever had before that time a spouse. It therefore appears that there was no impediment to their marriage. They have lived together since that time as husband and wife, and Hung She has been held out to the community as the wife of Lau Fat Leong (L. Ah Leong). There has been no divorce between these people.

The status of Lau Fat Leong (L. Ah Leong) has, in previous investigation by this office, established as that of a naturalized citizen. Since the above-named Hung She appears beyond any doubt to be his lawful wife, I recommend her admission.

From the records of this office, the Hawaiian Birth certificates presented, and from statements now made, I am of the opinion that the other three applicants were born in the Hawaiian Islands, and I therefore recommend their landing. I might add in the case of Hung She that she has lived in the Hawaiian Islands for more than 20 years, returning to China recently, i. e. early in 1907.

GEO. S. CURRY,  
Chinese Inspector.

GSC.

O. K.—RAYMOND C. BROWN. [221]

Territory of Hawaii,  
County of Oahu,—ss.

Lau Ah Tung, being first duly sworn, deposes and says; that he is a son of L. Ah Leong, a merchant of Honolulu; that he was born on the 4th day of November, A. D. 1889; that he went with his father per S/S. "Siberia" in June, 1903, to China and there attended school at Kiantchu; that on December 5th, A. D. 1905, he married at Kiantchu, according to Chinese custom, Wong Ah Pin, daughter of Wong Fi Yen, deceased, and Leong See, living; that his wife will be nineteen years of age on June 20th, A. D. 1908; that he returned to Honolulu per S/S. "Korea" in August, A. D. 1907, and that his said wife is at present at Hongkong, preparing to join him here.

And further affiant sayeth not except that he makes this affidavit for the purpose of having the



landing of his said wife at said Honolulu facilitated.

SAU AH TUNG,

Subscribed and sworn to before me this 31st day of October, A. D. 1907.

[Seal]

COLIN CAMPBELL,

Notary Public, First Judicial Circuit. [222]

December 28, 1907.

Case of WONG AH PIN, ex S/S. "NIPPON MARU," December 27, 1907, Alleged Wife of Citizen.

GEO. S. CURRY, Chinese Inspector.

TONG KAU, Chinese Interpreter.

Applicant, sworn, testifies:

Q. What is your name? A. Wong Ah Pin.

Q. How old are you? A. 19 years old.

Q. Have you ever been in the United States before? A. No.

Q. Where were you born in China? A. Moon Tin, Chung Inn, Kah Hing Chow, China.

Q. What is the name of your father?

A. Wong Fai Yuen.

Q. What is the name of your mother?

A. Leong She.

Q. Are they living or dead?

A. My father is dead, and my mother is living.

Q. How many brothers and sisters have you?

A. I have four brothers, and two sisters.

Q. Where are your brothers and sisters?

A. The older brother is at Hong Kong, the others at Kah Hing Chow, home,—my older sister is mar-

ried to a man from Man Boy, Chung Inn, Kah Hing Chow, and my younger sister, stopping at home.

Q. Then you have three brothers and one sister stopping at your home now? A. Yes.

Q. What is the name of your husband?

A. Lau Dung.

Q. What is his married name?

A. I do not know that.

Q. Have you ever seen your husband?

A. Yes.

Q. When were you married to him?

A. In 1905, December 5.

Q. Where were you married?

A. Moon Tin, Kah Hing Chow.

Q. Where was your husband at that time?

A. Kew Boy, Chung Inn, Kah Hing Chow.

Q. You and your husband were present together when the marriage took place?

A. Yes, both at Kew Boy.

Q. Married according to the Chinese custom?

A. Chinese custom.

Q. Are you the first and only wife of Ah Tung?

A. Yes, I am the first and only wife.

Q. Where is Ah Tung now?

A. He is in Honolulu.

Q. When did he come here?

A. In August this year, took the steamer "Korea."

Q. From the time of your marriage until he left home did you live together as man and wife?

A. Yes. When my husband came here he wanted to bring me here with him, but the Consul

refused to let me come with him, and told my husband to get a paper from the Hawaiian Islands Government, and then your wife can come, that is the Consul at Canton.

Q. American Consul?

A. I think the American Consul.

Q. But why did he refuse to let you go with him?

A. Because I had no paper, and the Consul refused to let me come until my husband came here, and sent back a certificate. [223]

December 28, 1907.

Case of WONG AH PIN.

Applicant continued.

Q. What is the name of your husband's father?

A. Lau Fat Leong.

Q. Where is he? A. In Honolulu.

Q. What is the name of his mother?

A. Hung She.

Q. How many mothers has he?

A. I do not know, I have only seen one.

Q. How many brothers and sisters has he?

A. I never asked that, but heard he had one older brother here, and one older sister, but at home only one younger sister, and do not know how many younger brothers he has.

Q. Has he any older brothers in China?

A. No.

Q. He has a brother Lau Chin in China who is older?

A. Not at his home perhaps somewhere else. Hung She, the mother of my husband told me

that he had one older brother and one older sister in Hawaiian Islands, that is all she told me, and two younger brothers went back to China this year only.

Q. Have you any certificates or anything to show that you are married?

A. (Presents paper, Chinese writing, with name of applicant, born June 20, 12 o'clock, married 1905, December 5.)

Q. Any further statement to make?      A. No.  
(WONG AH PIN.)

her

X

mark.

Subscribed and sworn to before me this 28th day of December A. D. 1907.

GEO. S. CURRY,

Chinese Inspector and Act'g Imm'g't Inspector.

The foregoing testimony has been translated to the affiant by me, and before signing she has acknowledged that it is a correct record and that she fully understood the same.

TONG KAU,

Chinese Interpreter.

GSC. [224]

December 28, 1907.

Case of WONG AH PIN.

Alleged husband, sworn, testifies:

Q. What is your name?

A. Lau Ah Dung. (Chinese characters.)

Q. How old are you?      A. 18.

Q. What is the name of your father?

A. Lau Fat Leong.

Q. And the name of your mother?

A. Hung She.

Q. Is that your own mother?      A. Yes.

Q. Give me the names of your father's other wives?

A. Ho She, and the other one is Wong She.

Q. Where are your father's wives now?

A. Hung She, and Wong She in China, and Ho She is in Honolulu.

Q. How many brothers and sisters have you?

A. I have eight brothers and three sisters.

Q. Give me their names and ages?

A. Lau Yin, m., don't know age, a little over 20; I am No. 2, aged 18; Lau Wong, m., aged abt. 16; Lau Kong, m., aged 12 or 13; Lau Jung, m., aged abt. 10; Lau Sung, m., aged about 9; Lau Chu, m., aged about 8; Lau Bing, aged about 5, m.; Lau Chin, m., about 3; Amoy, sister, aged about 20; Lin Dai, sister, aged about 4, and one sister, very young, do not know the name.

Q. Where were you born?

A. Punchbowl and Queen Streets.

Q. Hong Kong?      A. Honolulu.

Q. Born here or in China?      A. Here.

Q. Have you ever been to China?      A. Yes.

Q. When did you go there and when did you return here?

A. Went to China in 1903, and returned here again about August this year.

Q. When you were in China where did you live?



A. Kew Boy, Kah Hing Chow, China.

Q. What did you do there?

A. I went to school.

Q. Are you married or single? A. Married.

Q. When and where and how were you married?

A. December 5, 1905, married at Kew Boy, China, Chinese custom.

Q. What is the name of your wife?

A. Wong Ah Ping.

Q. How old is she? A. 19.

Q. What are the names of her father and mother? A. Wong Fee Yuen.

Q. And mother's name? A. Leong She.

Q. Are they living or dead?

A. Father is dead and mother is living.

Q. What village do they come from?

A. Man Tin, Chung Inn, Kah Hing Chow.

Q. Where is your wife?

A. I received a letter from my mother saying that she was going to come here by the "Nippon Maru."

Q. Between the time you were married and the time you left to come here, did you live together as man and wife? A. Yes.

Q. Why didn't you bring your wife here with you? A. My mother refused to let her come.

Q. Is that what you told your wife?

A. I told her did not have any paper, and that when I went back to Hawaii I would fix up the paper so that she could come. [225]

December 28, 1907.

Case of WONG AH PIN.

Alleged husband continued.

Q. Your wife says that you and she went to the American Consul and that the American Consul refused to let her come? A. No.

Q. Did you and your brother send Lau Ping Seong to China to bring your wives here?

A. No.

Q. He told me yesterday that they were coming here in his charge? A. No, it is not so.

Q. If your mother refused to let your wife come here before, how is it she is coming here now?

A. I wrote a letter to my mother and she changed her mind.

Q. Who is the woman you picked out (Applicant)? A. That is my wife Wong Ah Pin.

LAU AH DUNG.

Subscribed and sworn to before me this 28th day of December, A. D. 1907.

GEO. S. CURRY,

Chinese Inspector and Act'g Immig't Inspector.

The foregoing testimony has been translated to the affiant by me, and before signing he has acknowledged that it is a correct record and that he fully understood the same.

TONG KAU,

Chinese Interpreter.

BSC. [226]

File 870-C.

———, 1907.

Case of WONG AH PIN.

DECISION.

Applicant presents Hawaiian birth certificate in the name of Lau Ah Tung, No. 547, born in the Hawaiian Islands November 4, 1889, signed by Henry E. Cooper, Secretary of the Territory of Hawaii, dated June 24, 1901, picture attached, with affidavit, signed by Lau Ah Tung in reference to his marriage with applicant.

The Statements of applicant and witness in this case are corroborative of each other, there is no discrepancy between husband and wife, and there appearing no reason to doubt *bona fides* of claims advanced, I recommend the admission of this applicant, as the wife of a citizen of the United States.

Lau Ah Tung, returned to this port recently, and was admitted as a citizen.

GEO. S. CURRY,

Chinese Inspector and Act'g Immig't Inspector.

Approved.

RAYMOND C. BROWN,

Inspector-in-Charge.

GSC. [227]

Territory of Hawaii,

County of Oahu,

First Judicial Circuit,—ss.

Lau Ah Wong, being first duly sworn, deposes and says, that he is a son of L. Ah Leong, a merchant of Honolulu; that he was born on the 15th

day of June, A. D. 1890, in the said city of Honolulu, County of Oahu, Territory of Hawaii; that he went with his said father per S/S. "Siberia" in June, 1903, to China and there attended school at Kiantchu; that on February 27th, 1906, he married at said Kiantchu, according to Chinese custom, Chong Ah Kno, daughter of Chong Tsu Kin and Wong See, both parents living; that his said wife will be sixteen years of age on August 14th, 1908; that he returned to Honolulu per S/S. "China" in November, 1906, and that his said wife is at present at Hongkong, preparing to join him there.

And further affiant sayeth not except that he makes this affidavit for the purpose of having the landing of his said wife at said Honolulu facilitated.

(Sgd.) LAU AH WONG.

Subscribed and sworn to before me this 31st day of October, A. D. 1907.

[Seal] (Sgd.) COLIN CAMPBELL,

Notary Public First Judicial Circuit. [228]

December 28/07.

Case of CHONG AH KNO, ex S/S. "NIPPON MARY," December 27, 1907, Alleged Wife of Citizen:

GEO. S. CURRY, Chinese Inspector.

TONG KAU, Chinese Interpreter.

Applicant, sworn, testifies:

Q. What is your name? A. Chong Ngo.

Q. How old are you? A. 16.

Q. Have you ever been in the United States before? A. No.

Q. Where were you born?

A. Dung San, Kah Hing Chow; China.

Q. What is the name of your father?

A. Chong Tsu Kin.

Q. What is the name of your mother?

A. Wong She.

Q. 1st or second wife?

A. 1st wife, my father only has one wife.

Q. How many wives has your father-in-law?

A. I do not know how many.

Q. Are your father and mother living or dead?

A. Both of them are living.

Q. Where are they living?

A. In my village, China.

Q. How many brothers and sisters have you?

A. I have two brothers and one sister.

Q. Where are they?

A. All at home in my village in China.

Q. Are you married or single?

A. I am married.

Q. What is the name of your husband?

A. Lau Ah Wang.

Q. How old is he?

A. I think 16 years old, but I do not know for sure.

Q. Where is your husband now?

A. Honolulu.

Q. Have you ever seen him?

A. Yes, in Kew Boy, married to him in Kew Boy village.

Q. When were you married to him?

A. February 27, 1906.



Q. Was he in China then? A. Yes.

Q. When did he come here?

A. He came back here November, 1906.

Q. And from the time you were married until he returned here did you live together as husband and wife? A. Yes.

Q. What is the name of your husband's father?

A. Lau Ah Leong, also called Lau Fat Leong, he is in Honolulu.

Q. What is the name of your husband's mother, and where is she?

A. A. Hung She, she is in China.

Q. Why did you not come here at the same time your husband did?

A. The Consul at Canton, American Consul, refused to let me come.

Q. Do you know why he refused?

A. He asked me what kind of a paper I had, and also asked my husband, my husband showed him the paper, and said that he could go, but I could not.

CHONG NGO.

her

X

mark.

Subscribed and sworn to before me this 28th day of December, A. D. 1907.

GEO. S. CURRY,

Chinese & Act'g Immgr't Insp.

The foregoing testimony has been translated to the affiant by me, and before signing he has ac-

knowledge that it is a correct record and that he fully understood the same.

GSC.

(Sgd.) TONG KAU,  
Chinese Interpreter. [229]

December 28, 1907.

Case of CHONG AH KNO (NGO).

(Chinese writing.)

Alleged husband, sworn, testifies:

Q. What is your name? A. Lau Wong.

Q. How old are you now? A. 16 years old.

Q. You returned from China recently, did you not?

A. Not this year but November last year.

Q. What kind of a paper did you have when you returned here?

A. I left my Hawaiian birth certificate in China.

Q. Where were you born?

A. Born Queen and Punchbowl Streets, Honolulu.

Q. Your father's name is? A. L. Ah Leong.

Q. When you were in China where did you live?

A. Kew Boy, Chung Inn, Kah Hing Chow.

Q. When you returned here you told me you were married to Chong She from Dung San village, is that right? A. Yes.

Q. What is the date of your marriage?

A. February 27, 1906.

Q. What is the name of your wife's father?

A. Chong Tsu **Kin**.

Q. And her mother? A. Wong She.

Q. And where do they come from—what village?

A. Dung San.

Q. You were in China when you were married?

A. Yes.

Q. How were you married, according to what custom?     A. Chinese.

Q. Why did your wife not come here with you when you came here in November, 1906.

A. I wanted to bring my wife with me, but my father wrote to me that I had better let my wife come with my brother Lau Ah Dung, and so I did not bring her with me.

Q. Did your brother Lau Dung ever come here?

A. Yes, he came here in August or September, this year.

Q. Did he bring your wife with him?

A. No, I do not know why.

Q. Didn't he tell you why he did not bring her with him?

A. Yes, he told me the mother refused to let my wife come.

Q. Whose mother?

A. My brother's mother, Hung She.

Q. What is your wife's individual name?

A. Chong Ngo.

Q. Is she your first and only wife?

A. Yes, my only wife.

(Witness the applicant identify each other as man and wife.)

Q. From the time you were married until you came here did you live together with Chong Ngo as husband and wife?     A. Yes.

Q. Who is the other woman you saw out in the room with your wife?

A. My brother's wife (Applicant Wong Ah Pin).  
(Sgd.) LAU WONG.

Subscribed and sworn to before me this 28th day  
of December, A. D. 1907.

(Sgd.) GEO. S. CURRY,  
Chinese and Act'g Immgr't Inspector.

The foregoing testimony has been translated to  
the affiant by me, and before signing he has ac-  
knowledged that it is a correct record and that he  
fully understood the same.

TONG KAU,  
GSC. Chinese Interpreter. [230]

File 870-C.

December 28, 1907.

Case of CHONG AH KNO (NGO).

#### DECISION.

Applicant presents Hawaiian birth certificate No.  
543, in name of Lau Ah Wong, born in the Ha-  
waiian Islands, June 15, 1890, with picture at-  
tached, signed by Henry E. Cooper, Secretary of  
the Territory of Hawaii, dated June 24, 1901. And  
certificate, signed by Lau Ah Wong, to the effect  
that he was married to Applicant on certain date,  
etc.

The testimony offered in this case is without  
discrepancy, the status of Lau Ah Wong has al-  
ready been thoroughly investigated and found to  
be that of a citizen. In view of the positive char-  
acter of the statements made there appears no  
reason to doubt *bona fides* of claims advanced that

applicant is the lawful wife of an American citizen, and I therefore recommend her admission.

(Sgd.) GEO. S. CURRY,  
Chinese Inspector and Act'g Imm'g't Inspector.  
Approved.

(Sgd.) RAYMOND C. BROWN,  
Inspector-in-Charge. [231]

September 5th, 1907.

Case of LAU AH TUNG, an Alleged Hawaiian-born Person of Chinese Descent, ex S/S. "Korea," Sept. 6, 1907.

HARRY B. BROWN, Immigrant Inspector and Acting Chinese Inspector.

TONG KAU, Chinese Interpreter.

Applicant, sworn, testifies:

Q. What is your name? A. Lau Ah Tung.

Q. How old are you? A. 18 years.

Q. What is your father's name?

A. L. Ah Leong.

Q. Were you born in Honolulu? A. Yes.

Q. Where was that? A. On Queen St. [232]

September 6th, 1907.

Case of LAU AH TUNG.

Ex S/S. "Korea." 9/6/07.

#### DECISION.

Applicant presents a Hawaiian birth certificate and is identified by the picture of the applicant attached thereto. I believe the applicant is a Ha-



waiian-born person of Chinese descent. I therefore recommend that he be admitted as such.

HARRY B. BROWN,  
Immigrant Inspector and Acting Chinese Inspector.  
Approved.

RAYMOND C. BROWN,  
Inspector-in-Charge. [233]

November 26, 1906.

Case of LAU WANG, ex S/S. "China," November  
26, 1906, Alleged Hawaiian-born Person of  
Chinese Descent.

GEO. S. CURRY, Chinese Inspector.

TONG KAU, Chinese Interpreter.

(Chinese characters.)

Applicant, sworn, testifies:

Q. What is your name? A. Lau Wong.

Q. How old are you? A. 15 years old.

Q. What right have you to be admitted here now?

A. I was born here.

Q. What is the name of your father?

A. Lay Fut Leong.

Q. What is the name of your mother?

A. Ho She.

Q. What is your father's business?

A. He is a merchant, grocery store, the store  
name is L. Ah Leong.

Q. Have you any brothers or sisters?

A. Six brothers and one sister.

Q. Give me their names and ages?

A. Lau In, aged 22 or 23; Lau Dong, aged 17;  
Lau Kong, aged 13 or 14; Lau Jung, aged 11; Lau  
San, aged 8 or 9; Lau Chu, aged 7; Lau Bing, aged

5, Lau Chin, aged 3, all brothers, and sister Ella, Chinese name Kai Tai, aged 20.

Q. Where are all of your brothers?

A. Lau Dong and Lau Chin are in China the rest are here.

Q. Where were all of your brothers and sister born?

A. Lau Chin born in China the rest of them all born here.

Q. Have your mother and father been to China recently?

A. Father went to China with me, but I have another mother in China.

Q. Which is your own mother?

A. Ho She, the one here.

Q. How many wives has your father got altogether? A. 3.

Q. Give me the names of all of them?

A. 1st wife is Hung She, 2d one is Ho She, my own mother, and the third one is Wong She.

Q. Where are your father's wives?

A. Two are here and one is in China.

Q. Give me the names of the two who are here?

A. Hung She, the first one and Ho She, the second one.

Q. When did you go back to China?

A. In 1903.

Q. Give me the month, day and steamer?

A. "Siberia," I don't remember the month and day.

Q. Did you go back alone or did someone go with you?

A. My father with my brother Lau Dong went back to China together.

Q. And when did your father return here?

A. He returned here in 1904.

Q. While you were in China where did you live, what village?

A. Chung Non big town, Kew Boy, village.

Q. Are you married? A. Yes.

Q. What is the name of your wife, and where does she come from?

A. Her name is Chong She, she comes from Dung San village. Aged 15.

Q. What did you do while you were in China, go to school? A. Yes. [234]

November 26, 1906.

Case of LAU WANG.

Applicant continued.

Q. Have you got any papers to show that you were born here?

A. I have only this paper (showing certificate of residence issued in his name, No. 7729, person other than a laborer, student).

Q. Did you come down to the Immigration before you went away to have your Hawaiian birth investigated? A. No.

Q. Do you know of anyone in Honolulu who can tell me about your being born here?

A. I do not know.

Q. Don't you know anyone here?

A. Yes, I know Lau Sau Chin, at the time I left

here was a young boy, studied at St. Louis college,  
forget the name of my teacher.

SAU WAN.

Subscribed and sworn to before me this 26th day  
of November A. D. 1906.

GEO. S. CURRY,

Chinese Inspector, and Act'g Immig't Inspector.

The foregoing testimony has been translated to  
the affiant by me, and before signing he had ac-  
knowledged that it is a correct record and that he  
fully understood the same.

TONG KAU,

Chinese Interpreter.

GSC. [235]

November 26, 1906.

(Chinese characters.)

Case of LAU WONG:

Alleged father, sworn, testifies:

Q. What is your name? A. Lau Fut Leong.

Q. How old are you? A. 50.

Q. How long have you lived in the Hawaiian  
Islands? A. 28 or 29 years.

Q. Always made your home in Honolulu during  
that time? A. Yes.

Q. Where do you live now?

A. On Queen St., Honolulu.

Q. And what is your business?

A. I have a grocery store, on King St. L. Ah  
Leong is the name of the store.

Q. You are a married man? A. Yes.

Q. How many wives have you? A. 3.

Q. Are your wives all living? A. Yes.

Q. Give me their names?

A. Hung She, is the first wife, second one Ho She, and the third one is Wong She.

Q. Where are your wives living now?

A. Ho She and Hung She are here the other one is in China.

Q. What is the name of your native village in China? A. Chung Non, Kew Boy village.

Q. How many children have you?

A. Ten altogether, nine boys and 2 girls makes 11 children in all.

Q. Give me the names and ages of all of your children?

A. Lau Yin, about 21 years old; Lau Dong, aged 17; Lau Wang, aged 15, justing coming here; Lau Kong, aged about 12; Lau Jung, aged about 10; Lau San, aged about 9; Lau Chu, aged 7; Lau Bing, aged 4 or 5; Lau Chin, aged 3, boys, and girls, Amoy 18 or 19 years old, English name Ella; and another one named Amoy, born last year.

Q. Where were all of your children born?

A. All born here with the exception of Ah Chin.

Q. Where was he born? A. In China.

Q. Where are all of your children now?

A. Three are in China, one coming back now, rest are all here.

Q. Give me the names of the three in China?

A. Lau Wang, Lau Dong, and Lau Chin.

Q. Give me the name of the one who is coming here now? A. Lau Wang.

Q. How long has Hung She been in these Islands?



A. She has been here 22 or 23 years.

Q. How long has your wife Ho She been here?

A. 18 or 19 years.

Q. Have either of your wives ever been back to China since you first came here? A. No.

Q. When did your son Lau Wang go to China?

A. June 1, 1903.

Q. What steamer? A. "Siberia."

Q. Did he go there alone at that time?

A. No, myself, and his brother Lau Dong went there together.

Q. When did you return here?

A. March 11, 1904.

Q. What kind of a paper did you have to return on?

A. I have a naturalization certificate under the Hawaiian Kingdom? [236]

November 26, 1906.

Case of LAU WONG.

Alleged father continued.

Q. Who is there in Honolulu who knows about your son Lau Wang, and knows that he was born here, and is your son?

A. Chu Gem, and C. K. Ai.

Q. Was 1903, the first time Lau Wang had ever been in China? A. Yes.

Q. Is he married? A. Yes.

Q. What is the name of his wife?

A. Chong She, from Dung San.

Q. Has your son Lau Wang got any papers to show that he was born in Hawaii?

A. Yes, I gave to him.

Q. What was it you gave to him?

A. He has a Hawaiian birth certificate.

LAU AH LEONG.

Subscribed and sworn to before me this 26th day of November, A. D. 1906.

GEO. S. CURRY,

Chinese Inspector and Act'g Imm'g't Inspector.

The foregoing testimony has been translated to the affiant by me, and before signing he has acknowledged that it is a correct record and that he fully understood the same.

TONG KAU,

Chinese Interpreter.

GSC. [237]

November 26, 1906.

Case of LAU WANG.

#### DECISION.

The father of this applicant, L. Ah Leong presents as evidence of his citizenship Naturalization certificate issued in name of L. Ah Leong, under the Hawaiian Kingdom, date of naturalization November 12, 1890, signed by C. N. Spencer, Minister of the Interior. It may be added here that there is no doubt as to Mr. Lau Leong's mercantile status. Testimony of father and son in this case is corroborative, the one of the other, and when brought together their actions proved beyond a question of a doubt the relationship claimed. Mr. C. K. Ai also appeared in this office and identified the applicant, Lau Wang, as being the son of L. Ah Leong born in Honolulu. The boy speaks fair

English, and shows considerable knowledge of Honolulu, and its surroundings. I have no doubt of the *bona fide* character of the claims advanced by applicant, and therefore recommend his admission as Hawaiian born and as the minor son of a naturalized citizen of the United States.

GEO. S. CURRY,

Chinese Inspector and Act'g Immgr't Inspector.

Approved.

RAYMOND C. BROWN,

Acting Chinese Inspector-in-Charge.

GSC. [238]

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

No. 55125

Subject \_\_\_\_\_

327

DEPARTMENT OF LABOR.

Gen. No. 16.

No. 55125/327.

Washington, D. C., February 11, 1922.

I hereby certify that the annexed is the original and complete file of the Bureau of Immigration covering the case of Ho Shee, *alias* Ho Ah Keau,

---

For the Commissioner General of Immigration.

(Sgd.) F. H. LARNED,

Special Assistant.

(Official Title.)

OFFICE OF THE SECRETARY.

I hereby certify that F. H. Larned, who signed the foregoing certificate, is now, and was at the

time of signing, Special Assistant to the Commissioner-General of Immigration, and that full faith and credit should be given his certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this eleventh day of February, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

(Sgd.) E. J. HENNING,  
Assistant Secretary of Labor.

WCW.

N. [239]

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

Washington.

Address reply to

Commissioner-General of Immigration,  
and refer to

No. 55125/327.

February 11, 1922.

Inspector-in-Charge,  
Immigration Service,  
Honolulu, T. H.

In reply to your letter of January 5, 1922, No. 4393/1

4382/212, you are advised that the appeal of Ho Shee, *alias* Ho Ah Keau, has been dismissed.

The exhibits in the case are herewith returned, and there is also being sent you herewith, in accordance with your request, Bureau file No. 55125/327, duly certified, covering the case of Ho

Shee. It is requested that the same be promptly returned when no longer needed in connection with the expected habeas corpus proceedings.

For the Commissioner General:

---

Special Assistant.

WCW.

Incl. 5674 (certified record).

Incl. 5675.

217.

February 8, 1922.

55125/327.

In re HO SHEE, *alias* AH KEAU.

The case comes before the Board of Review on appeal.

Attorney Hott heard.

This is the case of a Chinese woman applying for admission to Hawaii on the ground that she is the wife of a Chinese resident there whose citizenship is conceded. The attorney in this case does not represent the applicant but, on the other hand, represents one Hung Shee, a resident of Hawaii, whom he alleges is the lawful wife and, therefore, he urges that the present appeal be denied.

It appears that the alleged husband in this case is a very wealthy man, being reputed to be worth about \$750,000, and it is apparent there are some steps on foot to defeat the interest of the alleged legal wife, Hung Shee. [240]

We will first consider the evidence tending to show that one Hung Shee is the lawful wife of the man in question, Lau Ah Leong, *alias* Lay Fut



Leong. It appears that Hung Shee has had 13 or 14 children by Leong, 7 of whom are still living. The record shows that in 1910, when the man appeared as a witness, he testified that Hung Shee was his wife. Everything in the record points to the fact that she is his lawful wife. There is but one piece of evidence of this relationship missing, and that is the marriage certificate. It is easy to understand how a document of this nature pertaining to a ceremony celebrated approximately 35 years ago can be lost, and it is not believed the fact that this document cannot now be presented in evidence should serve as a bar to the claimed relationship. It is believed reasonable to hold that the fact this man has lived with her openly and notoriously for such a long period of time, that he has officially recognized her as his wife, and that she to all intents and purposes is his wife, raises a reasonable presumption that the marriage is valid.

Now, just a word in regard to the claim of the present applicant, Ho Shee. This woman claims to have married Leong about 1891 and that she went back to China January 13, 1910, and is at present returning from that trip. There are many discrepancies in the testimony of this woman; for instance, Leong and Hung Shee testified that the real Ho Shee lived in the same house with Hung Shee from the time of her arrival in 1891 until the time she went to China in 1910. Leong and an alleged son of Ho Shee, who came in the same boat with applicant, testified that Ho Shee lived in the same house in China with Leong's third

wife in 1910 until the time she came to Honolulu on the present trip. Regardless of this testimony, however, the applicant denies that she ever lived in either of these houses. She likewise denies what has been very positively established, to wit, that Leong had any other wives or children by other wives.

The burden of proof naturally falls on the applicant in this class of cases. In regard to the alleged marital status of Hong Shee and Leong, it is noted that there are two adjudications against Leong for living in adultery with the real Ho Shee. On one occasion he was fined \$300, and on another occasion when he was arrested for living with Ho Shee he entered a plea of "*nolo contendere*" and was given a brief imprisonment and fined \$500 and costs.

This board is satisfied that the best evidence favors the recognition of the validity of the marriage between Hong Shee and Leong. It further believes that the real Ho Shee is not identical with the present applicant.

It is RECOMMENDED that the appeal be denied.

ROBE CARL WHITE,  
Chairman, Board of Review.

ES/AVM.

W.

So ordered:

E. J. HENNING. (Sgd.)

E. J. HENNING,  
Assistant Secretary. [241]

No. 55125/327.

February 4, 1922.

In re HO SHEE, *alias* AH KEAU.

MEMORANDUM FOR THE ASSISTANT SECRETARY.

The above-named Chinese woman is applying for admission to the United States as the wife of a citizen thereof, the citizenship of Lau Ah Leong, the alleged husband, being conceded. Two members of the board of special inquiry which handled the case on Honolulu have voted to admit, while one member has dissented, appealed from the majority opinion, and thereby caused the record to come before the Bureau and Department for review.

At the outset, it may be stated that the case has not been very satisfactorily handled at Honolulu, and the dissenting member of the board seems to be the only one who has not overlooked the fact that the burden of proof, in a matter of this kind, is by law, clearly upon the Chinese person applying for admission as one to whom the provisions of the Chinese Exclusion Laws do not apply. The Chairman of the board has increased his own difficulties by referring the case to the United States Attorney at Honolulu for his opinion upon the legal questions thought by the Chairman to be involved, and the sum total of the United States Attorney's opinion to the Chairman is that, if the Chairman and the board, are satisfied that Ho Shee is the wife of the claimed husband, then she is entitled to admission, an opinion which is entirely correct, as far as it goes. In rendering his

opinion, however, the United States Attorney has indulged in a lengthy discussion of the doctrine of presumptions, as applied to the marriage laws and customs of the Territory of Hawaii, and has practically instructed the Chairman of the board that, under the conditions, the presumption of the legality of the marriage of the applicant to the claimed husband is to govern, because of the fact that when her marriage to the claimed husband took place, a regular license was shown to have been procured by the contracting parties; whereas, in the case of a former alleged wife, one Hung Shee, by name, proof is lacking that the necessary license was procured. It appears that the Hawaiian courts do not recognize Common-law marriages; that where a showing of a regular marriage is made and the parties have lived together and held themselves out to the public as man and wife, a presumption exists that the marriage was solemnized in accordance with the statutory requirements; but that this presumption is overcome by the production by another party of record or documentary evidence that a subsequent marriage was actually gone through and that all of the formalities were complied with. The United States Attorney's letter to the Chairman of the board was correct in setting forth that if the board was satisfied that Ho Shee were actually the legal wife of the claimed husband, admission should take place, a fact with which the Chairman was no doubt fully conversant, but he was not correct in holding that the board should be guided and governed by the doctrine of



presumption as applicable to marriages in Hawaii. It does not appear to the Bureau that it is necessary for the claimed wife, residing now in Honolulu, to present any evidence whatever to the board that she is the legal wife of Lau Ah Leong. That is purely a collateral question. The question for the board to determine is whether or not the evidence presented by Ho Shee, considered in the light of all surrounding circumstances, favorable as well as unfavorable, establishes that she is the legal wife of a citizen of the United States. If it does, then she should be admitted; otherwise, she should be excluded. It is not for the board to decide which of the two women, if either, is the wife of the claimed husband, but simply whether the applicant has reasonably established her claims in that connection. [242]

No. 55125/327.

In weighing the evidence presented in behalf of the applicant it would have been, and was, quite competent for the board to consider the evidence submitted by other parties, tending to show that the claimed husband already had a wife living in the Hawaiian Islands. There is ample evidence in this record to show a clear possibility that the woman now living in Honolulu, and claiming to be the wife of Lau Ah Leong, actually is his wife, and this one circumstance, it seems to the Bureau, is sufficient to cast a substantial doubt upon the claims of the applicant.

In the person of the alleged husband of this applicant, the Government is quite clearly dealing



with a Chinese who believes in the practice of concubinage, as known to the Chinese, if not in fact, as suggested by the dissenting member, in the practice of polygamy. The evidence shown that Lau Ah Leong has at various times cohabited with, and apparently held out to the public, two, three and perhaps four women, by all of whom he has had children. He has quite clearly violated every law and principle of decency as known to our system of Government, and is entitled to very little consideration or credence in connection with the issues to be determined in this proceeding. After holding out one Hung Shee to the public as his real legal wife for a period of time covering some thirty-eight years, he now appears and claims the present applicant, with whom he has concededly gone through a marriage ceremony, as his wife.

The record shows that about 1883 Lau Ah Leong was married to one Hung Shee, by whom he has had some fourteen children; and that in 1891 he married a person named Ah Keau, with whom the present applicant claims to be identical. At the time this ceremony with Ah Keau was gone through, Hung Shee was still living in Honolulu, and Lau Ah Leong, apparently at the same time, held her out as his wife. There is also record evidence that he has upon occasions referred to Hung Shee as his first wife and Ho Shee as his second wife, plainly showing that he has, in a civilized community openly and apparently notoriously, practiced concubinage, as known to the Chinese. He is now seemingly endeavoring to take advantage of the tech-

nicalities of American law to do what he could not do under the Chinese custom, which permits of the practice of concubinage, and substitute a second wife or concubine, for what, under the Chinese custom, would be the first and legal wife. There is ample reason for believing, however, that the first marriage, that to Hung Shee, was properly solemnized, and that the subsequent marriage to Ah Keau (applicant) was bigamous. The courts of Honolulu have themselves passed upon this feature and have imposed a fine and nominal jail sentence of three months upon Lau Ah Leong for his bigamous marriage to Ah Keau. In 1907, Lau Ah Leong, pleaded guilty and paid a fine of three hundred dollars for unlawful cohabitation with Ho Shee (who applicant claims to be) and others. He at that time made no defense of marriage to Ho Shee. On March 21, 1910, a grand jury in the United States District Court for the District of Hawaii indicted Lau Ah Leong for bigamy, charging that on the 25th day of October in the year 1886, he married Hung Shee, and did then and there have her for wife; and that Lau Ah Leong in 1908 did knowingly and unlawfully and feloniously marry and take as his wife one Ho Shee, otherwise called Ah Keau, the said Hung Shee being then and there living and in full life. Lau Ah Leong entered a plea of *nolo contendere*, was given a short imprisonment and fined \$500 and costs. It will be observed that in this proceeding, as well as in the one in 1907, for unlawful cohabitation, he failed to make any defense, and

did not bring in any proof of his alleged lawful marriage to Ah Keau in 1891, well knowing, apparently, that such marriage was bigamous, and would not help his case, and knowing also that under the conditions then existing, Hung Shee would probably not have as much difficulty in proving the strict compliance with the technical requirements as she would have, a number of years later. [243]

No. 55125/327.

The Federal authorities, of course, are not bound by any such narrow rule in reaching a determination of the issues in this case as that attempted to be set down by the United States Attorney at Honolulu. The fact that the record abounds with evidence that Lau Ah Leong was married to another woman long before he went through the ceremony in 1891 with Ah Keau, at which time the woman to whom he was first married was still living, is sufficient to cast a substantial doubt upon the fact of the legal marriage to Lau Ah Leong of Ah Keau, with whom the present applicant claims to be identical. That Ah Keau is not his wife is shown by his own actions and testimony, covering a period of many years, during which he has always held out the other woman as his first wife, and has never claimed Ah Keau to be his wife.

In addition to the reasons which exist for doubting that a person named Ah Keau is really the legal wife of Lau Ah Leong, there is also evidence in the present record which tends to indicate that the present applicant is not identical with the Ah

Keau (Ho Shee) with whom Lau Ah Leong went through the ceremony in 1891. In the present case, Lau Ah Leong himself has testified that he has a third wife, one Wong Shee living in China, and that Ho Shee, while in China lived in the same house with this third wife. The applicant, however, denies that she ever lived with the wife in China, and denies that her alleged husband ever had any other wives; although the evidence shows that Ho Shee, or Ah Keau, when in Honolulu, lived with the first wife and should have knowledge of her. She also claims to have no knowledge of the numerous children resulting from the cohabitation of Lau Ah Leong and Hung Shee, in Honolulu, and Wong Shee in China. This surprising lack of knowledge on the part of Ho Shee, as to the other marital ventures of her alleged husband, casts a substantial doubt upon her being identical with the woman who took part in the 1891 marriage and who departed for China in 1910. There are no photographs from which identification could be made.

The Bureau, after careful consideration, is of the opinion that the evidence in this record clearly fails to establish that Ho Shee, or Ah Keau, is of the classes exempt from the operation of the Chinese Exclusion Laws. She claims to be married to a citizen of the United States, but the evidence fails wholly to support her claim. The evidence fails to show that the ceremony between Ho Shee, or Ah Keau, and Lau Ah Leon in 1891 was valid, and incidentally, it fails to establish that the present ap-



plicant is identical with the female party to that apparently unlawful proceeding. It is settled law that the burden of proof in a case of this kind is upon the applicant; and that the decision of the administrative authorities, based upon some evidence, after fair hearing, is final. The District Court at Honolulu, before which this case may go on habeas corpus, and the Circuit Court for the Ninth Circuit, to which it may go on appeal, have affirmed these fundamental principles, so often that it is unnecessary to cite decisions. In this case, the hearing has been fair in every respect, and there is ample evidence to justify the conclusion that the status of the applicant has not been established. The Bureau, being of the opinion that the burden of proof has not been sustained, recommends that the appeal of the dissenting member be sustained, [244] and that the applicant's request for admission to the United States be denied.

For the Commissioner-General.

---

Special Assistant.



CEB.

Ralston & Hott.

Oral Hearing Requested.

Send certified record to Honolulu.

No. 55125/327.

In re HO SHEE, *alias* AH KEAU, Applicant for  
Admission at Honolulu as the Wife of a  
Naturalized Citizen.

BRIEF IN OPPOSITION TO THE ADMIS-  
SION OF THE APPLICANT.  
STATEMENT.

The applicant, Ho Shee, applied for admission at Honolulu as the wife of Lau Ah Leong *alias* Lau Fat Leong, *alias* Lay Fut Leong, a native of China but who went to the Hawaiian Islands about 1880 and is said to have become a naturalized citizen of the United States under the acts of Congress annexing the Islands to the United States.

Ho Shee claims to have been born in Hong Kong and that she went to Hawaii about 1891 and there married said Lau Ah Leong in that year, and that she went back to China on January 13, 1910, and is now returning from that trip.

She was given a hearing before a Board of Special Inquiry at Honolulu. Two members of the board voted to admit. The third member voted to exclude and noted an appeal to the secretary of Labor. The Inspector-in-Charge at the port, in his letter of transmittal, dated January 5, 1922, recommends that the applicant be denied admission.

It appears that said Lau Ah Leong has been married at least four times. Three of the wives are now living, the applicant (if she is not a perjured substitute for the second wife), one in Hawaii and one in China. The first wife, Hung Shee *alias* Hung Dai Kim, *alias* Fung Shee, is living in Hawaii. The applicant, if she is the woman she pretends to be, is his second wife.

### ARGUMENT.

The appeal should be sustained and the applicant deported for the following reasons:

I. The evidence does not reasonably establish that the applicant, Ho Shee, is the wife of a citizen.

II. The applicant is not a member of the exempt classes and has no status of her own which would entitle her to admission. [245]

III. The applicant belongs to a class of persons excluded under the Immigration Act.

#### I.

THE EVIDENCE DOES NOT REASONABLY  
ESTABLISH THAT THE APPLICANT,  
HO SHEE, IS THE WIFE OF A CITIZEN.

1. The burden of proof is on the applicant to satisfactorily establish her right to admission. She claims to have married L. Ah Leong in the Hawaiian Islands in 1891, and has applied for admission as his wife. The evidence, however, does not satisfactorily establish that she is the Ho Shee who went through a marriage ceremony with said L. Ah Leong. There are so many discrepancies between her testimony and that of the other witnesses that it is difficult to believe that she can be the

same person. For instance, the alleged husband, and his first wife, Hung Shee, testify that Ho Shee lived in the same house with Hung Shee from the time of her arrival in Hawaii in 1891 up until she went to China in 1910, a period of about 18 years. The alleged husband, and an alleged son of Ho Shee who came on the same boat with applicant, testify that Ho Shee lived in the same house in China with L. Ah Leong's third wife from 1910 up until she left for this country on her recent trip.

The applicant, however, denies that she ever lived in either of these houses. She denies that her husband ever had any other wives. She does not know that her husband had any children by any other woman. She does not know any woman by the name of Hung Shee (the first wife), or Wong Shee (an alleged third wife) although according to other testimony in the case, which is in agreement, the real Ho Shee lived in the same house with the first wife for eighteen years and with the latter for about ten years.

Although Hung Shee is the mother of thirteen children by L. Ah Leong, seven of whom are still living and the names of these children were mentioned to applicant, she claims not to know any one by the names given. There are many other indications of attempted imposture. The contradictions in the testimony, applicant's lack of knowledge on many material matters and her apparent effort to conceal the truth, raises a strong presumption that this applicant is not identical with the

Ho Shee who is alleged to have married L, Ah Leong in 1891. Certainly the evidence can not reasonably satisfy any one that she is the same person.

2. Even if the evidence is sufficient to establish applicant's identity, she is but the second wife of said L. Ah Leong and the Department has never recognized the second wife of a Chinaman as being a lawful wife so long as the first wife was living. Said L. Ah Leong married Hung Shee about 1883, and she has lived with him ever since, as his wife; she had thirteen children by him of which four sons and three daughters are now living. The record shows until very recently he held her out to the community as his lawful wife; that he has so stated on many occasions, and never, until after the arrival of this applicant a few months ago has he stated to the contrary. Other witnesses have testified that Hung Shee was his first wife and copies of public records, court proceedings and lawful judgments, where the very fact was the issue tried and determined, show that Hung Shee is his lawful wife. [246]

On November 26, 1906, in the case of Lau Wong, a son, both the then applicant and L. Ah Leong testified that Hung Shee was the first wife and Ho Shee the second wife. In the case of Hung Dai Kam (Hung Shee) who made a trip to China and was an applicant for readmission January 7, 1910, the then applicant testified that she was married to Lau Fat Leong (L. Ah Leong) at Kohala, Hawaii, when she was 17 years old, about 25



years prior thereto; that she was his first and lawful wife; that he had other wives but not lawful wives; that his second wife was Ho Shee (whom this applicant is pretending to be). On the same date and in the same case, L. Ah Leong testified that said Hung Shee was his lawful wife from whom he had never been divorced; that he considered her his lawful wife; that she was the *first* woman he was married to and he had never been divorced; that after he married Hung Shee he lived with her as her husband and held her out to the community as his lawful wife; that Ho Shee was his second wife. In the same case the examining inspector, Jan. 7, 1910, reports that "since the above-named Hung Shee appears beyond any doubt to be the lawful wife, I recommend her admission." She was so admitted.

On April 16, 1914, Lau Chong (a son of L. Ah Leong), in his own case, testified that his father's wives Nos. 2 and 3 are living in China. The records show that on said date Ho Shee and Wong Shee were in China, and Hung Shee, the first wife, was in Hawaii. In the case of Albert A. Leong, a son of L. Ah Leong, said L. Ah Leong testified on April 16, 1915, that he was married three times; that his first wife was Hung Shee; that he married her when he was 28 years old at Kohala, Hawaii; that she lives in Honolulu; that he has four sons and three daughters by her. In the same case and at the same time, the said Hung Shee testified that she came to Hawaii when she was 17 and that she married L. Ah Leong about a month



after arrival—married him at Kohala, Hawaii, and has four sons and three daughters living and five sons and one daughter dead.

We will now take up some of the former adjudications of the marriage of L. Ah Leong and Hung Shee, the first wife. On April 12, 1907, a grand jury in the United States District Court for the Territory of Hawaii found a true bill of indictment against L. Ah Leong charging unlawful cohabitation with *Ho Shee* and others, under Section 5352 as amended by act of Congress approved March 22, 1882. The defendant, L. Ah Leong, appeared in person and entered a plea that "he is guilty as charged," and he was fined \$300.00 and the costs of prosecution. It will be noted that his indictment and plea of guilty was a number of years after he claims to have married Ho Shee. He is a man of great wealth and wide experience and the record shows that he relies a great deal on lawyers and has had many of them. He certainly was not ignorant of the fact that if he was lawfully married to Ho Shee he could not be guilty of unlawful cohabitation with her.

On March 21, 1910, a grand jury in the United States District Court for the District of Hawaii indicted said L. Ah Leong for bigamy (under act of March 22, 1882.) The bill charges "that L. Ah Leong on the 25th day of October in the year of our Lord, 1886, did marry one Hung Shee, and her, the said Hung Shee did then and there have for wife; and that said L. Ah Leong afterwards, to wit, on the 10th day of February in the year of our Lord,

1908, in the said District and Territory of Hawaii, and within the jurisdiction of said court, did knowingly, unlawfully and feloniously marry and take as his wife one *Ho Shee*, otherwise called *Ah Keau*; \* \* \* the said *Hung Shee* being then and there living and in full life \* \* \* and against the peace and dignity of the United States." The defendant was arrested and brought before the court. He entered a plea of "*nolo contendere*," was given a brief imprisonment and fined \$500.00 and the costs of the prosecution. So far as this case was concerned, his plea was one [247] of guilty and an admission that *Hung Shee* was his lawful wife. (*Miles vs. U. S.* 103 U. S. 304, 26 L. Ed. 481.)

*Hung Shee*, the first wife, was regarded in Honolulu by the conveyancers there as the lawful wife of said *L. Ah Leong*. There are on file in this case certified copies of five warranty deeds executed by said *L. Ah Leong*, and his wife, *Hung Shee*, dated in 1918, 1919, and 1920. Property rights have vested on the regularity of her marriage and the record thereof. The purchasers of all the property conveyed by him must have been certain that *Hung Shee* was his lawful wife or they would not have accepted her signature to the deeds. Furthermore, these deeds were prepared by said *L. Ah Leong*, or under his direction. The first deed, dated March 15, 1918, sets forth in the body of the instrument—"And I, *Fung Shee*, the wife of the above-named grantor, in consideration of the premises, do hereby sell and convey unto the said grantee all of my

dower and right of dower in and to the above described premises." The acknowledgment of said deeds sets forth—"before me personally appeared L. Ah Leong and Fung Shee, his wife, known to me to be the persons described in and who executed the foregoing instrument." All of the other deeds contain the same declarations as the foregoing. In addition, two of the said deeds contain the following: "In witness whereof, we, the said L. Ah Leong and Fung Shee, his wife, have hereunto set our respective hands and seals." In addition to the statement in the body and in the acknowledgment, heretofore mentioned, one of the deeds commences as follows: "Know all men by these presents, that we, L. Ah Leong and Fung Shee, his wife, for and in consideration" etc.

There is also on file in this case an affidavit, dated December 13, 1921, by Fung Dai Kim (Hung Shee) in which she states that she is the person who signed the above mentioned deeds; that she did so at her husband's request; that her family name is Fung and that the word "Shee" when used in connection with a surname is indicative of the feminine and according to Chinese custom and practice a female retains her family name after marriage.

During the past year L. Ah Leong, apparently in an effort to deprive his wife, Hung Shee, of her interest in their joint property, aggregating about \$750,000.00, made an effort to form a corporation and turn all of their property over to said corporation. To this end, he drew up a lengthy document,

a copy of which is filed in this case. Hung Shee refused to sign over her rights to said corporation and employed an attorney to look after her interest. In the month of August, 1921, said L. Ah Leong called on his attorney and "asked him to try and prevail upon *his wife*" to sign said instrument. Fung Dai Kim (Hung Shee) was mentioned in said instrument as the wife of L. Ah Leong. (See affidavit of F. E. Thompson, dated December 10, 1921, filed in this case.)

Certainly no stronger proof of marriage could be desired. It fully meets every requirement laid down by the Supreme Court of Hawaii. In the case of *Apong vs. Marks* (1 Haw. 83) that court said, "that in all civil cases, marriage may be proved by reputation, declarations, and conduct of the parties and other circumstances usually accompanying that relation. For example, their conversation and letters, addressing each other as man and wife; their living together in that relation, and being generally reputed to be man and wife; their appearing in respectable society, and being there received as man and wife; the assumption of the woman of the name of the man; their joining as man and wife in the conveyance of her real estate; the acknowledgment and treatment of their children by them as legitimate, and any other conduct indicative of the marriage." [248]

It is true that no marriage license has been produced, but neither is this required under the laws of Hawaii to establish a legal marriage. In the case of *Godfrey vs. Rowland* (16 Haw. 377) the



Supreme Court held that in order to prove a legal marriage it is not necessary to prove that a license to marry was issued. The license will be presumed from the celebration of the marriage. This is the law in Hawaii and the decision of the court on this point has never been reversed or overruled. Under the facts herein presented, the courts are practically unanimous in holding that it will be presumed that all of the requirements of the law have been complied with. Hung Shee states that she believed that L. Ah Leong had done all that was required for a valid marriage. He so informed her uncle and she saw him have some papers at the time of the marriage but does not know whether it was the marriage license. There was a big celebration at the time with Chinese, Hawaiians and white people present. For other authorities bearing upon this question, see the following: *U. S. vs. Simpson*, 4 Utah, 227, 7 Pac. 257; 18 R. C. L. 421-423; *Travers vs. Reinhardt*, 205 U. S. 423, 51 L. ed. 865.

3. The chairman of the Board of Special Inquiry, in his summary of the case, says: "In my opinion Hung Shee ought in justice to be considered as the lawful wife of Lau Ah Leong. She has been living with him and had a large number of children by him and has given him material assistance to amass a large fortune, but from an opinion of the United States Attorney as to the law, I feel compelled to hold that Ho Shee is the lawful wife."

As a matter of fact, the United States Attorney, for some reason which does not appear in the record,



did not write an *opinion* as to what was the law upon the facts disclosed by the record, but he wrote an *argument* in favor of admitting Ho Shee, the second wife. He, however, fell into two serious errors; 1st. He assumed that the burden of showing that L. Ah Leong's first marriage to Hung Shee was valid, is on the Government. He overlooks the fact that Ho Shee is applying for admission under the exclusion laws as the wife of a citizen of this country, and Congress has specifically placed the burden upon her to establish the fact to the satisfaction of the administrative officers that she is entitled to admission. The burden is not on the Government to show that L. Ah Leong was previously married. The burden is not on the Government to show that a license was issued for the marriage of L. Ah Leong and Hung Shee. The burden is on the applicant to show that no such license was issued and that her alleged husband did not have a wife living when she married him. This she has not done. She has wholly failed to show that Hung Shee was not the lawful wife of L. Ah Leong at the time she (Ho Shee) married him, and until this is done, any certificate of marriage she may have is of no force. Whether the marriage relationship exists is a pure question of fact which must be satisfactorily established and whether it is satisfactorily established is a matter to be determined now by the Secretary. See *Looe Shee vs. North*, 170 F. 566; *U. S. vs. Sprung*, 187 F. 903; *Wong Heung vs. Elliott*, 179 F. 110. In view of applicant's absolute failure to show that she is the wife of a citizen, we

might end the discussion here, but on account of the United States Attorney's apparent solicitude for the applicant, we call attention to his second error.

The United States Attorney assumes, without any proof being offered, that Hung Shee's marriage to L. Ah Leong was a common-law marriage, and therefore void in Hawaii and that the administrative officers of the United States in the execution of the immigration and exclusion laws, are bound by state laws and decisions of State and Territorial courts. In this he is wholly mistaken. The administrative officers of the Government in executing the immigration and exclusion laws are not bound by any laws or decisions of the courts of States and Territories. The territorial Supreme Court of Hawaii is an inferior court. See sections 1126a and 1223 of the Judicial Code. [249]

In the case of *Lee Leong vs. U. S.* (217 F. 49), the Circuit Court of Appeals for the 9th Circuit, following the decision of the Supreme Court of the United States of *Williams vs. United States*, 137 U. S. 113, 34 L. ed. 590, applied the rule that "no act of the territory of Hawaii can avail to affect the laws of the United States in regard to immigration of aliens."

In the case now under consideration, the applicant is relying upon a decision of the courts of the Territorial Supreme Court of Hawaii to control the decision in this proceeding, and to a large extent, nullify the immigration law and use it for the purpose of committing a palpable crime against morality and decency and the established policy of our

Government. A similar state of facts existed in the case of Leong Shee (54790/68), the second wife of a citizen of the United States. The husband had formerly married another woman in China and had separated from her and terminated his first marriage in conformity with the customs in China. Five years later (in 1907) he married the applicant, Leong Shee and in 1917 brought her to the United States. She was paroled and during her parole gave birth to two children in this country, who by reason of their birth here were citizens of the United States. The case came before the Department on an appeal taken by the applicant in 1921. The appeal was dismissed and the applicant ordered deported, the Secretary of Labor thus recognizing the first marriage as valid although no longer valid in China, and declining to recognize as valid the second marriage which was valid in China. What is the difference between a marriage in China and a marriage in Hawaii in so far as it affects the execution of a law of the General Government? No state, much less the United States, is bound to recognize a foreign marriage or decree of divorce which is against the public policy of such state, or where such marriages are in derogation of good morals. In such cases comity cannot be invoked to recognize their validity. (Succession of Gabisso, 119 La. 704, 121 A. S. R. 529, 535 and cases cited.)

The Supreme Court of the Territory of Hawaii has had a way of making some strange decisions affecting established rights that have arisen under the informal ways of the prior governments and the

Supreme Court of the United States has used some interesting language in setting their technical reasoning aside.

In *Damon vs. Hawaii*, 194 U. S. 157, an action was brought to establish a fishing right under the act to create the Territory of Hawaii. The Supreme Court of the Territory refused to recognize the right holding it was too vague. The Supreme Court of the United States in reversing that decision said:

“A right of this sort is somewhat different from those familiar to the common law, but it seems to be well know to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit *a prendre* as such. The plaintiff’s claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.”

In *Lowrey vs. Hawaii*, 206 U. S. 206, 223, the Territorial Supreme Court disregarded a contract for want of assumed formality, after the prior governments had long recognized the contract in practice as binding upon them: [250]

The Supreme Court of the United States in reversing their decision, said:



“It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties, and that the only criterion can be a precise and isolated form of words which, at the end of half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward.”

In another case taken from the decision of the Circuit Court of Appeals, which following the lead of the local court, disregarded a decision of the old Hawaiian court in a matter of land title for want of form the Supreme Court of the United States said:

“It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirements of the law of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decisions, has been stated and restated, from *United States vs. Percheman*, 7 Pet. 51, 95, 8 L. ed. 604, 620, to *Michigan Trust Co. vs. Ferry*, 228 U. S. 346, 354, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure,



and wholly of local control, it seems to us plain that the judgment must be reversed.”

*John II Estate vs. Brown*, 235 U. S. 342, 349.

When it is considered how naturally careless the officials of a semi-barbaric kingdom must have been it is not surprising that every one in Hawaii to whom this question of L. Ah Leong's marriage was of importance found that his first wife was duly married to him and presumably they were duly married. What has become of the record of marriage, after all these years, naturally is a difficult fact to prove. But there is too much established to have it lightly brushed aside by the technicalities relied on by the District Attorney and the chairman of the local board below.

Bigamy, unlawful cohabitation and adultery are crimes against the United States (sections 313-316, Penal Code), and in dealing with these crimes, the United States is not bound by any territorial legislations or opinions of Territorial courts. (In *re* Murphy, 5 Wyo. 297, 40 Pac. 398; *Davis vs. Beason*, 133 U. S. 333, 33 L. ed. 637.) The man whom Ho Shee claims as her husband was found guilty of unlawful cohabitation with the person she pretends to be and he was likewise found guilty of committing bigamy with that woman and paid his fine in both cases. Are these formal adjudications of the marriage of the first wife to be ignored after vested rights have become settled upon them? No, whatever the general law may be in Hawaii in other cases, the first wife's status has been established and her rights will not be denied at this late date,

no matter what the intermediate Territorial court may have presumed to say on the general subject of marriage. It would be scandalous if it were now held that the first wife were to be required to produce a license to authenticate her marriage in view of the facts in this case.

There is another important point which should not be overlooked. In order that all persons within the jurisdiction of the United States should be accorded equal rights and equal protection of the laws to which they are entitled, the decisions of the Secretary of Labor should be uniform in their operation, and how can such decision be uniform if they follow the laws and the decisions of state courts at the port where the applicant applies for admission, and which are in conflict with the state [251] laws at some other port of entry? Take for instance, a case where the husband lived in a state where common-law marriages were not recognized, he could abandon a common-law wife with whom he had lived as husband for many years and reared a large family, cast them aside, helpless and penniless, and marry another woman and bring her to this country. But if he lived in a state where a common-law marriage was valid, a second wife could not be admitted so long as the first wife was living and undivorced. The administrative officers would be confronted with the same difficulty regarding many other conflicting laws and decisions if they relied upon state laws and decisions in the execution of the immigration and exclusion laws.

But the decision is not that of the highest court having jurisdiction of the question. It is a mere intermediary court and its decision is plainly violative of the law as understood universally in Hawaii for more than forty years as shown by the record in this case.

All of this, however, is merely speculative reasoning as applied to the facts of this case. The status of the first wife in this case has been judicially determined and the applicant is an impostor.

## II.

The applicant is not a member of the exempt classes and has no status of her own which would entitle her to admission. The record shows that she is a housewife, and, therefore, a laborer.

## III.

The applicant belongs to a class of persons excluded under the Immigration Act. The record shows that she is illiterate. Furthermore, it would appear that she believes in polygamy as if she were the person she pretends to be, she lived in Hawaii for about fifteen years with a man whom she knew had a wife living, and had several children by him. She lived for ten years in the same house in China with another woman who was also married to the same man. (Sec. 3, Immigration Law.)

In view of the fact that the applicant has failed to establish the fact that she is the wife of a citizen, we respectfully submit that the appeal should be sustained on this ground and the applicant ordered deported.

An oral hearing is requested.

Respectfully submitted,

RALSTON & HOTT;

By G. W. HOTT,

On Behalf of Hung Shee, the Lawful Wife of L.  
Ah Leong.

R. D. SILLIMAN,

Of Counsel.

January 31, 1922. [252]

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

Washington.

Address reply to

Commissioner General Of Immigration

and refer to

No. 55125/327.

January 20, 1922.

Messrs. Ralston and Hott,

Attorney at Law (Evans Building),

Washington, D. C.

Sirs:

This is to advise you that the record in the case of Ho Shee is ready for your inspection. You will be allowed ten days within which to review same and submit a brief.

Respectfully,

(Signed) ALFRED HAMBTON,

Assistant Commissioner General.

WCW. [253]

File 4333/1—4382/212.

U. S. DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

Refer to

No.

125

—

327

Port of Honolulu, T. H.

Office of Inspector-in-Charge.

January 5, 1922.

Commissioner General of Immigration,

Washington, D. C.

In re HO AH KEAU, Alleged Wife of a Natural-  
ized Citizen.

Name—HO AH KEAU, *alias* HO SHE, *alias* LAU  
HO SHE.

Marital Status—Married.

Age—45.

Literacy—Cannot read or write.

Occupation—Housewife.

Citizenship—Claims to be the wife of a natural-  
ized citizen.

Date of Arrival—December 7, 1921.

Steamship—"Siberia Maru" from Hong Kong.

Destination—Honolulu, T. H.

Decision of Board:

December 19, 1921, two members voted to ad-  
mit the applicant as the wife of a natural-  
ized citizen.



December 19, 1921, appeal taken by dissenting member of Board — on the ground that applicant is a person who believes in and practices polygamy and as a person who made false and misleading statements before the Board of Special Inquiry.

Mr. Harry Irwin and Mr. J. Lightfoot are attorneys for the applicant.

A brief has been filed by said attorneys.

The hearings of the board were held on December 9th, 10th, 13th and 19th.

The reasons for the admission and denial of this applicant are set forth on pages 15, 16, 17 and 18.

In case the applicant is denied admission by the Department, it seems likely that habeas corpus proceedings will be instituted, and I would, therefore, respectfully request that you send the decision of the Secretary by mail with a certified copy of the record. In case the applicant is admitted please notify us by cable. The next sailing available for the deportation of this applicant will be the latter part of January.

Files 1892-C, 4393/1 and 4393/1-A are transmitted as references in the case—kindly return same after they have served their purpose.

It is recommended that the applicant be denied.

(Sgd.) RICHARD L. HALSEY,  
Inspector-in-Charge. [254]

U. S. DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

File No. 4393/1—4382/212.

Port of Honolulu, T. H.  
RECORD OF BOARD OF SPECIAL INQUIRY.  
In the Matter of the Application of HO AH  
KEAU, Alleged Wife of a Citizen—LAU  
CHONG—Hawaiian Born—1-1-2, "Siberia  
Maru," 12/7/21, for Admission to the United  
States.

Convened—December 9, 1921.

Chairman—EDWIN FARMER.

Member—LOUIS N. LAND.

Member—MARTHA MAIER.

Interpreter—HEE SOU HOY.

Typist—MARTHA MAIER.

Held for Special Inquiry by Inspector—RICH-  
ARD L. HALSEY.

Applicant, sworn by Chairman, testifies:

Q. Have you secured an attorney to represent  
you in the hearing that is about to commence?

A. I do not know.

Q. Do you expect to present witnesses to estab-  
lish your right to admission to the United States?

A. Yes—my husband will get the witnesses.

Q. During the course of this hearing it may be  
necessary for some officer of this Service to take  
testimony outside of this office, or go to some other  
Governmental office or place and search records.  
Are you willing that this should be done and have  
the testimony taken in this manner, and also have

the report of the search of the records considered by this Board of Special Inquiry? A. Yes.

Q. Do you desire a friend or relative present at this hearing? A. No.

Q. What is your name and age?

A. Ho Ah Keau, *alias* Ho She, *alias* Lau Ho She, 45.

Q. Where were you born?

A. Hong Kong, China.

Q. When did you first come to Hawaii?

A. When I was 18 years old.

Q. How many times have you been back to China? A. Once, 10 years ago.

Q. Do you know the date and the name of the steamer on which you departed?

A. "Korea," about 10 years ago arrived in China just one week before New Years.

Q. Did you get a return permit?

A. No, these are the only papers.

NOTE:—Presents

- (1) Affidavit sworn to by herself before the American Consul at Hong Kong to the effect that she is the lawful wife of Lau Ah Leong.
- (2) A marriage certificate dated May 25, 1891, certifying that Lew Ah Leong and Ah Keau were married on that date and signed by C. M. High (authorized to perform the marriage ceremony) witnessed by Ah Lo.
- (3) A certificate from the Board of Health showing the record of marriage of Lew

Ah Leong and Ah Keau—license issued by C. P. Gulic, May 25, 1891—date of marriage May 25, 1891—place, Honolulu—name of witness—Ah Lo—signed by M. H. Lemon, Registrar General—Cert. dated Aug. 5, 1921. [255]

- (4) An affidavit sworn to by Lau Ah Leong June 13, 1919, to the effect that his son Lau Chong was born in Hawaii—a picture of the applicant Lau Chong is affixed.

Q. What is the name of your husband?

A. Lau Ah Leong, *alias* Lau Fat Leong, I do not know.

Q. Older than you are? A. Yes.

Q. In Honolulu? A. Yes.

Q. How many children have you?

A. Five sons and two daughters that are now dead.

Q. What are the names and ages of your five sons?

A. Lau Ah Wa, 28 or 29; Lau Ah San, 23; Lau Ah Chew, about 21 or 22; Lau Ah Bun, 19; Lau Ah Chong, 12.

Q. Where were your children born?

A. In Hawaii.

Q. Where are they all now?

A. Lau San is on the mainland, all the rest are in Hawaii, Lau Chong came with me on the steamer.

Q. Can you give the date of Lau Chong's birth?

A. 3d month I do not know what date—he is 13 by Chinese count (April or May, 1909).

Q. How old was he when he went to China?

A. When he was 2 years old.

Q. Who went to China with him?

A. Myself, Lau Chew, Lau Bun and my two daughters.

Q. Have any of them ever come back to Hawaii?

A. Lau Chew and Lau Bun have returned.

Q. When did they come back?

A. I do not remember.

Q. Very long ago? A. Yes.

Q. Has Lau Chew any other name?

A. I do not know Lau Chew is the only name I know of.

Q. Is that his full name? A. No.

Q. What is his full name? A. Lau Chew.

Q. Has Lau Bun any other name? A. No.

Q. What is Lau Bun's full name?

A. Lau Dart Bun.

NOTE:

Lau Ah Chu—CI. 1937 green.

Lau Tut Bin—CI. 1938 green arrived from China per SS. "Siberia" Jan. 5, 1914, and were admitted as Hawaiian Born—See 3177-C.

NOTE:

The passenger list of the SS. "Korea" departing for China Jan. 13, 1910, contains the following names: Mrs. Ah Keau, 35 years, female, born in China.



Ah Chew, 12, male, U. S. A.

Ah Ping, 6, male, U. S. A.

Ah Chew Tai, 3, female, U. S. A.

Lau Chang, 8 months, male, U. S. A.

Q. What were the names of your two daughters that died in China?

A. Lau Kew Tai and Lau Ah Fee—Al Ah Fee died in Hawaii.

Q. Did you not say that you took two girls with you? A. Yes.

Q. What was the name of the other girl that went with you?

A. Lau Ah Look, she did not get a paper, she died in China.

Q. Did your husband ever have any other wife except you? A. I do not know.

Q. Did he have any other children by any other woman except you? A. I do not know.

Q. Do you know a woman by the name of Hung Dai Kam? A. No.

Inspector Farmer shows applicant picture of Hung Dai Kam—you know who that woman is?

A. I do not know.

Q. Is it not a fact that that woman was married to your husband by Chinese custom in Hawaii before he was married to you?

A. I do not know.

Q. That woman has been recognized as the first wife of Lau Ah Leong your alleged husband on various occasions in this office—she arrived here from China Jan. 7, 1910, and was admitted as the lawful wife of Lau Ah Leong—

A. (No answer.)

Q. Do you know any boy by the name of Lau In?

A. No.

Q. A girl by the name of Lau Kai Tai?

A. No.

Q. A boy by the name of Lau Dung? A. No.

Q. A boy by the name of Lau Kong? A. No.

Q. All of those and others are alleged by this woman as being her children by Lau Ah Leong?

A. I do not know. [256]

Q. Lau Ah Leong testified in this office on Nov. 26, 1906, and he said he had three wives, one named Hung She, one by the name of Ho She and one by the name of Wong She, and that Ho She and Hung She were then both in Hawaii, you are Ho She, he also testified as to his children and mentioned his children by you as well as his other two wives; do you mean to say that he could have that other wife in Honolulu with all those children and you also with all of your children and still you know nothing about it?

A. I do not know when I was married to Ah Leong I was 18 years old and lived in a different place, far distant away.

Q. Where did you live? A. Kakaako.

Q. Where did his other wife live?

A. I do not know.

Q. Then how did you know that she lived far distant away from where you lived?

A. I made my husband live far away from me—he sometimes went home at night.

Q. Is it not a fact that your husband has another wife or perhaps a concubine in China?

A. Yes, he has one, she is dead.

Q. What was her name? A. I do not know.

Q. Was it Wong She? A. I do not know.

Q. Has he any children by her? A. No.

Q. Has he not got a boy by the name of Ah Chin by her?

A. I lived at Hong Kong when I was in China.

Q. Has he or has he not a boy by the name of Ah Chin in China born from Wong She?

A. Yes, I heard he has a son by the name of Ah Chin, but I never saw him.

Q. What is your husband's occupation?

A. He is a merchant.

Q. What was he doing at the time you married him? A. He was a merchant had a small store.

Q. Where was his store?

A. Queen Street near an Hawaiian church.

Q. That is in Kakaako is it?

A. Near an old Hawaiian church I do not know that the place is called.

Q. How far was that store from where you lived? A. I do not know.

Q. Do you know where you lived? A. Yes.

Q. How far is it from where you lived to the Hawaiian church? A. Not very far.

Q. You understand do you that you are now under oath testifying before this Board of Special Inquiry and that anything which you say which is not the truth pertaining to a material matter is perjury and that if you tell a falsehood in regard to a

material fact you can be prosecuted and punished by fine and imprisonment for the crime of perjury—do you understand that? A. I do not know.

Q. Very well I will so inform you now that such is the case and you can be punished for perjury for false swearing.

Q. We have received very creditable information to the effect that you and Hung She the former and first wife or concubine of Lau Ah Leong associated together in Honolulu—you understand that I am not saying she was necessarily his lawful wife but she knew you, knew of the fact that you had children by Ah Leong that you were married to him and the circumstances are such that you must have known of her and yet you say that you know nothing whatever about her—what have you to say as to that?

A. I have nothing to say.

Q. Then you swear positively do you that Lau Ah Leong never had any wife, concubine, or woman with whom he was living in Honolulu except yourself? A. I do not know.

Q. Hung She knows all about you and she knows about the other woman in China and she knows all about your children and Lau Ah Leong knows all about you and the other two women and he has mentioned in this office and testified concerning you and the other two women and numerous children that he had by you and Hung She and one child that he had by the woman in China and yet you profess absolute ignorance of all this—what have you to say about that?



A. I do not know I lived at Hong Kong all the time. [257]

Q. You lived in Honolulu from the time you came to Hawaii until 1910 you have so stated yourself and you were married in 1891 and lived here for years and years and Hung She lived here for years at the same time?

A. How could I know that for I was not living in the same place with her?

Q. How could you help but know it under such circumstances as these?

A. His other wife lived in a different place from me besides my husband Lau Ah Leong very seldom went home to live with me.

Q. Here is this marriage certificate which you have presented to us saying that Lew Ah Leong was married to Ah Keau, are you that same woman Ah Keau who is mentioned in this certificate?

A. Yes.

Q. Do you think that we can accept your statement as true in regard to that fact?

A. The witness Ah Lo is dead now.

Q. After you have said so many things contrary to evidence which we have before us—things which we have every reason to believe are false how can we believe you in regard to anything you say? A. (No answer.)

Q. All we want is the truth, the whole truth and nothing but the truth? By this you understand it does not necessarily follow that we are going to deny you admission but if we decide your case intelligently we must know the truth.



A. What do I want to lie for?

Q. We do not pretend to say what your motives are but we want to know the truth and we have strong evidence tending to show that you have not told the truth. A. (No answer.)

Q. How old were you when you were married?

A. I was 18 years old.

Q. How long was that after you came to Hawaii from China?

A. I was married to him by correspondence at first.

Q. Well, how long was it before you came to Hawaii that you were married to him by correspondence?

A. I arrived here on Sunday and was married on Thursday.

Q. When were you married to him by correspondence?

A. On the 10th month the year before that.

Mr. LAND.—Q. How old were you when you first came to Hawaii? A. 18.

Q. You were married by correspondence was that before you left China? A. Yes.

Q. Then were you married again by American custom as soon as you arrived in Honolulu?

A. Yes.

Q. How long did you live in Honolulu before you returned to China?

A. About 16 or 17 years.

Q. Did you ever know a woman by the name of Hung She? A. No.

Q. Did you at any time during the 17 years that you lived here live in the same house with a woman named Hung She?    A. No.

Q. Do you believe that it is moral and right for a man to have more than one wife at the same time?    A. I do not know.

Q. I asked you if you think it is right for a man to have more than one wife at the same time?

A. No.

Mr. FARMER.—Q. Have you any further statement to make?    A. No.

---

Applicant LAU CHONG sworn, testifies:

Q. What is your name and age?

A. Lau Chong, 12 years old.

Q. What was the date of your birth?

A. I do not know I went to China when I was 2 years old.

Q. Where were you born?    A. In Hawaii.

Q. Who is your father?    A. Lau Fat Leong.

Q. How old is he?    A. I do not know.

Q. Where is he?    A. In Hawaii now.

Q. When did you see him last?

A. Year before last I saw him in China—when he went to China I saw him there.

Q. Who is your mother?    A. Ho She.

Q. How old is she?    A. 45 years old.

Q. Where is she?

A. She came with me on the steamer?

Q. Is that your mother that came with you?

A. Yes. [258]

Q. How many brothers and sisters have you?

A. 9 brothers—one in China and 8 in Hawaii.

Q. What are their names and ages?

A. Lau Yin, Lau Dung—I do not know how old Lau Yin is—Lau Wang, Lau Kong, Lau Chung, Lau San, Lau Chew, Lau Bin, Lau Chan, and myself.

Q. How many sisters have you?

A. One sister, Lau Yuk Nin.

Q. Where were they all born?

A. All born in Hawaii.

Q. Where are they now?

A. I do not know now.

Q. Are any of them in China?

A. Yes, one in China, Lau Chan.

Q. Have all of these brothers and the sister you have mentioned the same father and the same mother as yourself?

A. No—my sister, Lau Wang, Lau San, Lau Chew, Lau Bin and myself have the same mother.

Q. Are your brothers and your sister all living?

A. All the brothers and one sister living.

Q. Lau Yuk Nin is living is she? A. Yes.

Q. Did you ever have any brothers or sisters that died?

A. One died in Hawaii and one died in China—two sisters died—the other sister is married now.

Q. Who is the mother of Lau Yin?

A. Hung She.

Q. Where is Hung She? A. In Hawaii.

Q. Who is the mother of Lau Dung?

A. Hung She.

Q. Who is the mother of Lau Kong?

A. Hung She—the mother of Lau Chan is Wong She.

Q. Is Wong She living?

A. She is living in China.

Q. Where have you been living in China?

A. How Boi village, Har Hing Chow, China.

Q. Have you been in Hong Kong any of the time? A. Yes.

Q. How long were you in Hong Kong?

A. Ten days.

Q. You been living in the village have you right along since you went to China? A. Yes.

Q. Is Lau Chan in China?

A. Yes, he is attending school in China.

Q. How many people are living now in your house in China?

A. Lau Chan; Lau Chan's mother, Wong She, and one servant; my mother and myself; my uncle's son, and my aunty's son.

Q. Is that all? A. Yes.

Q. They have been living there right along every year? A. Yes, in the same house.

Q. How old is Wong She? A. I do not know.

Q. Older than your mother?

A. My mother is older—Hung She is the oldest—my mother second and Wong She last.

Q. How many wives has your father?

A. Three wives.

Q. What are their names?

A. Hung She, Ho She and Wong She.

Q. Hung She is in Hawaii? Ho She is your

mother coming with you and Wong She is in China, is that correct? A. Yes.

Q. Have you ever seen Hung She?

A. No, I went to China when I was 2 years old.

Q. Has Hung She ever been to China since you went to China? A. No.

Q. Then how do you know that she is your father's other wife? A. My father told me.

Q. Did you ever hear your mother Ho She speak of Hung She?

A. Yes, she told me Hung She, Wong She and herself are the wives of my father.

Q. When did she tell you that?

A. A long time ago told me in the village.

Q. Did she tell you that you were born in Hawaii? A. Yes, she told me that I was born here.

Q. What have you been doing in China?

A. Attending school.

Q. In the village? A. Yes.

Q. How long have you been going to school?

A. Started when I was 7 years old.

Mr. LAND.—Q. Did your mother Ho She and Wong she both live in the same house in the village? A. Yes.

Q. Can you read and write in Chinese?

A. Yes; I do not know English.

Q. Can you speak any English? A. No.

Q. Have you any further statement to make?

A. No.

(Sgd.)

劉昌

[259]



Witness sworn, testifies: CI. 1932 green.

Q. What is your name and age?

A. Lau Ah Leong, *alias* Lau Fat Leong, 65 by Chinese count.

Q. Where were you born?

A. Chung Yuen village, Gar in Chow.

Q. When did you first come to Hawaii?

A. About K.S. 5 or K.S. 6 (1879 or 1880).

Q. How many times have you been back to China?

A. About four times—1st time, 1903 returned to Hawaii 1904; 2d time, I think 1909 or 1910 and returned about 6 or 7 months later; 3d time, 1914 or 1915 returned about 7 or 8 months later.

Q. Are you married? A. Yes.

Q. What is the name of your wife?

A. Ho She, *alias* Ah Keau.

Q. How old is she? A. About 44.

Q. Where is she?

A. She came on the "Siberia Maru."

Q. How many children have you by her?

A. Five sons, two daughters one of the daughters are dead.

Q. Names and ages?

A. Lau Wong, 28 to 30; Lau Ah San I cannot give the ages; Lau Ah Chew, Lau Ah Bin born in 1903; Lau Chong, that is the applicant—the daughter was adopted by Chong Kong I do not know what her name is—the other girl went to China when she was three years old and died there.

Q. Have you a daughter by the name of Lau Yuk Nin?

A. She is the one that was adopted.

Q. Where are these sons that you have mentioned and the daughter?

A. Lau Wong and Lau Chew in Hawaii—working in the store—Lau Ah San in New York—Lau Ah Bin attending school here—Lau Ah Chong has arrived from China and Lau Lok Nin is in China.

Q. Where were they all born?

A. Punchbowl and Queen—Ah Chong was born on Liliha Street corner King.

Q. Did you ever have any other wife except Ho Shee? A. No.

Q. Did you ever have someone that you thought was your wife?

A. I never called any other woman my wife?

Q. You never called any other woman your wife?

A. In Chinese it can be considered as a wife but in English I cannot call a woman my wife if I am not married to her legally.

Q. What do you mean by being married legally?

A. I don't understand.

Q. Is it not a fact that you were married to a woman by the name of Hung She otherwise known as Hung Dai Kam?

A. She is not my wife she is working for me.

Q. Didn't you think that she was your wife?

A. No.

Q. Hung Dai She *alias* Hung She arrived at this port from China by the steamer "Siberia" Jan. 6, 1910, and at that time you testified and said that she was your lawful wife—the question was asked you, "Well which is your lawful

wife" and your answer was Hung She here is your testimony—(testimony is shown to Lau Ah Leong and explained by interpreter).

A. I do not remember maybe I made a mistake in answering.

Q. You testified fully in that case—I will ask the interpreter to read everything you said at that time and translate it in Chinese you also understand some English—page 3 case of Hung Dai Kam ex SS. "Siberia" Jan. 6, 1910, and the date of your testimony was Jan. 7, 1910, after you see that I think you must admit that there could not be any possibility of a mistake—you came to this office for the express purpose of testifying in behalf of that woman and securing her admission at this port as your lawful wife.

NOTE: Interpreter translates and explains the record to the witness.

A. I was not married to this woman she simply lived with me for a period of time.

Q. Then did you tell a falsehood when you testified here at that time.

A. No, in Chinese she can be called my wife but in English she cannot if I am not married to her. [260]

Q. Can a thing be the truth in Chinese and the falsehood in English?

A. She is not married to me and cannot be called my wife in English but can be called my wife in Chinese.

Q. You know very well that she could not be admitted at this port unless she was considered

your lawful wife—you said she was—we do not care what language you use when you speak the truth. A. I did not understand.

Q. We are not going to argue the question with you we are not going to listen to such foolish talk that you did not understand your own plain words and the purpose for which you actually came here—I will now ask you another question how many children have you by Hung She?

A. Four sons and four daughters.

Q. How many other wives have you had?

A. One more in China.

Q. What is her name? A. Wong She.

Q. How many children have you by her?

A. One son.

Q. Where was he born? A. Born in China.

Q. Where were Hung She's children born?

A. All born in Hawaii.

Q. And yet you mean to say that you lived with this woman all these years who was not your wife, cohabited with her, had a great many children by her and yet you mean to say you never thought she was your wife at all?

A. She does not want to get married to me she wants my money so afterwards I married Ho She.

Q. Did you continue living right along with Hung She after you were married to Ho She?

A. She wanted to live with me but did not want to get married to me.

Q. Did you have children born of Hung She after you were married to Ho She? A. Yes.

Q. You lived right along here in Hawaii with



two different women and had children by both of them at the same time?

A. Yes—at that time King Kalakaua was on the throne and the islands were not annexed.

Q. Nevertheless what you did was a violation at that time and always has been ever since civilization was established here—(No answer).

Q. Are you a citizen of the United States?

A. Yes.

Q. How did you become a citizen?

A. Through naturalization.

Mr. LAND.—Q. Did Hung She and Ho She and yourself all live in the same house at that time?

A. Yes, same house, different rooms.

Q. Where was your house at that time?

A. Punchbowl and Queen Streets.

Q. Is that the house that is now standing on Punchbowl and Queen Streets with the sign Ah Leong Block above it? A. Yes.

Q. How long did Hung She and Ho She live in that house? A. Over ten years.

Q. Ho She knew Hung She well during those ten years? A. Yes, they both lived together.

Q. Can you identify Ho She and your son Lau Chong? A. Yes.

Identification between the witness and his alleged son and wife is mutual.

Q. Have you any further statement to make?

A. No.

(Sgd.) L. AH LEONG.



Applicant HO SHE recalled, testifies:

Mr. LAND.—Q. When you came to Hawaii and married Ah Leong after you arrived here where did you go to live?

A. That place (pointing toward Kakaaka).

Q. What street—what house?

A. Near an old Hawaiian church.

Q. Was his store then? A. Yes.

Q. Is that the only house you lived in while you were in Honolulu? A. Yes.

Q. You lived in that house all the time you remained in Honolulu about 17 or 18 years?

A. Yes.

Q. And when you went back to China in 1910 you were living in that same house—when you left to go back to China? A. Yes.

Q. During that time I want to ask you again during that time 17 or 18 years was there ever a woman living in that same house by the name of Hung She? A. No.

Q. And you never knew a woman by that name in Honolulu? A. No.

Mr. FARMER.—Q. Lau Ah Leong has just testified here himself the man whom you claim to be your husband and he said that you and Hung She both lived together in the same house in different rooms for ten years in Honolulu at the corner of Queen and Punchbowl Streets? A. No.

Q. You mean to say that you did not? A. No.

Q. Is Lau Ah Leong telling the truth or is he telling a falsehood when he said that?

A. I do not know.

Q. You must know, you know whether you lived there with that woman and whether or not she was in that house you could not have lived there ten years without knowing it, why is it that you do not know? A. I never lived with that woman.

Q. Did you live in the same house in which that woman lived? A. No.

Q. Your son has testified before this board and he says that you told him in China that your husband Lau Ah Leong had three wives one of them named Hung She, yourself and Wong She?

A. No, I did not tell him that.

Q. Your son says that Wong She and yourself have both been living in the same house in the village in China—what have you to say as to that?

A. No, I was living in Hong Kong with my mother's relatives Wong She.

Q. How long did you live there in Hong Kong?

A. Since I went to China.

Q. Your son says that you lived in the village all the time after you went to China until you came back to Hawaii and that you just staid in Hong Kong 10 days.

A. My house in China is all broken down so I cannot live there and have lived in Hong Kong ever since I went to China.

Q. Then you mean to say that your son, Hung Shee and that your husband are all telling falsehoods and that only you are telling the truth?

A. I am telling the truth.

Q. And all the others are telling falsehoods are they? A. I do not know.

Q. Either you are telling a falsehood or the others are telling falsehoods you can't all be telling the truth—which are we naturally to believe?

A. I never tell a lie.

Q. If you did not live for ten years in Honolulu in the same house with Hung She then, if Lau Ah Leong is telling the truth, you are not his wife, because his wife lived in that house for ten years, do you understand?

A. I was married to him when I was 18 years old.

Q. We can reconcile your *your* statements with the statements of the other witnesses in this way—by holding that you are another woman that you are not the real one who was married to Lau Ah Leong. A. (No answer.)

Q. Where has Lau Chong been living?

A. Sometimes living in the village attending school and sometimes with me in Hong Kong—I live at Hong Kong.

Q. Where did he live before he started to school? A. Hong Kong.

Q. He says himself that he has been living in the village ever since he went to China and that you have been living in the village too in the same house and with your husband's other wife Wong She and several others? A. (No answer.)

Q. Have you any further statement to make?

A. No.

Witness sworn, testifies: CI. 12422 red, wife of a nat. cit.

Q. Name and age?

A. Hung She, *alias* Hung Dai Kam, 54.

Q. Are you also known as Fung Dai Kim Ah Leong? A. Yes.

Q. Where were you born?

A. Kwai Sin village, China.

Q. When did you first come to Hawaii?

A. 38 years ago.

Q. Have you ever been back to China?

A. Yes, been back once.

Q. When was that?

A. When my daughter was 3 years old returned when she was 5 years old—she is 17 years old now. (See file number 1892-C.)

NOTE: Witness returned from China Jan. 6, 1910, per SS. "Siberia"—the evidence indicates that she departed from China in January, 1907.

Q. You are coming here to-day to testify as a witness in the case of a woman who has arrived from China and claims that she is the lawful wife of Lau Ah Leong, is that the purpose for which you are coming?

A. Yes. I am his lawful wife.

Q. When were you married to Lau Ah Leong?

A. 38 years ago I was married to him when I was 17 years old.

Q. Were you married to him in China or Hawaii? A. In Hawaii.

Q. How long was that after you arrived in Hawaii that you were married? A. One month.

Q. Were you married to him by CORRESPONDENCE before you came?

A. A man brought me here from China, a relative of L. Ah Leong went to the steamer and took a look at me and picked me out to be L. Ah Leong's wife.

Q. And when you arrived here you left Honolulu and went over to Kohala and were married there?

A. I left here on Tuesday arrived in Kohala on Wednesday and had the party on Sunday.

Q. Were you married according to regular Chinese custom? A. Yes, real Chinese custom.

Q. Have you a Chinese marriage certificate?

A. Yes, I gave it to my uncle and my uncle gave it to Ah Leong.

Q. It was a regular Chinese marriage certificate of red paper with gilt letters on it? A. Yes.

Q. Did Ah Leong give you one?

A. I have only one certificate my mother made it out when I was married to Ah Leong I gave it to him.

Q. Was your mother in Hawaii?

A. No, she was in China.

Q. Did she send it from China after you were married? A. No, I brought the paper with me.

Q. Well, then if that is the case there must have been some correspondence before you came?

A. At that time when King Kalakaua was on the throne every Chinese was permitted to come here—at that time one of my friends came here to collect his debts and brought my sister and I here—I did not come here directly from China I came



here from the coast—my mother made out the certificate and told me when I came here to pick out the man I wanted and to get married to him.

Q. Is it customary for Chinese to tell their daughters to pick out the man they want to marry?

A. She gave me her consent to pick out the man I wanted.

Q. Was your sister also married?      A. Yes.

Q. Who did she marry?

A. Married to Ching Mook.

Q. Is your sister living now?

Q. She is living at Kaimuki.

Q. Was she present in Kohala at the time you were married to Ah Leong?

A. No, she married two weeks later and went to the other islands.

Q. The laws of Hawaii provide that when persons get married they shall procure a marriage license from an agent in Hawaii and that law was in force at the time you were married to Ah Leong did you or did Lau Ah Leong secure such a license?

A. I did not know what a marriage license was I came here when I was young—when they had the party I saw Ah Leong with a few pieces of paper in his hand—I did not know what kind of papers they were—there were many guests present Chinese, Hawaiians and white people—my uncle asked Ah Leong if everything was settled up and he said yes. [263]

Q. Then for all you know it may have been that Ah Leong secured the license; you can't say

whether he did or did not so far as your own knowledge goes? A. Yes.

Q. By that you mean you do not know?

A. I do not know—I saw him with papers in his hand—I took it for granted that everything was settled up.

Q. When you applied for a Form 430 paper you testified on August 3d of this year in this way—the question was asked you—“Did you get a marriage license?” and you said “No”—

A. I did not know it, even now I don’t know.

Q. When after you were married to Ah Leong you started to live with him as his wife did you?

A. Yes.

Q. Do you know this woman Ho She sometimes called Ah Keau? A. Yes.

Q. Did your husband afterwards get married to her? A. I do not know she was my servant.

Q. When did she come to Hawaii?

A. She is 46 years old now she came here when she was 17 years old.

NOTE: This would be about 1891.

Q. Your husband procured a marriage license at the time he married her—she has produced the certificate and the record showing that the license was granted here is this certificate saying that Lew Ah Leong and Ah Keau were married May 25, 1891, which would be KS. 17 (certificate is shown to witness).

A. I do not know maybe they were married secretly—when I had the two sons and the two daughters I employed her as my servant, my son is

37 now and my daughter 35. The youngest son is 32 and the other daughter 33, she is married.

Q. How many children did you have born before Ho She came to Hawaii? A. Four children.

Q. And you were living with Ah Leong and regarded by him as his wife in all respects?

A. Yes.

Q. Did he have some children born by Ho She?

A. Ho She was pregnant ten months after her arrival in Hawaii and I scolded my husband and intended to send her out and my husband asked my pardon so I did not send her out and do not know of this marriage.

Q. Did she live in the same house with you?

A. Yes, she was working for me and staid in the same house.

Q. Were you living in Kohala at that time?

A. I was married to Ah Leong on the 9th month on the 4th month of the next year he closed his store at Kohala and came to Honolulu and worked for Lee Look as a salesman in Honolulu, I worked for Lee Look as his cook and did not receive any payment—then after 3 years we rented a store and a room upstairs for \$7.00 a month.

Q. What we desire to know is where was the house in which you lived at the time Ho She was living in the house with you?

A. Corner Punchbowl and Queen Streets.

Q. How long was she living in that house with you? A. Over 10 years.

Q. Did your husband ever have any other wife except yourself and this Ho She? A. Yes.

Q. How many?

A. One more living in China and two that are dead.

Q. Did he marry any of these before he married you? A. No.

Q. You were absolutely the first one?

A. Yes, I had 4 children before Ho She came into the house.

Q. You say he has one living in China and two that are dead when did he marry those?

A. One died about 20 years ago and one died about 10 years ago—all his other wives were servants.

Q. Do you know when he first took them as servants?

A. I do not remember one came to his house 4 years before she died.

Q. Was that before you came to Hawaii?

A. I was in Honolulu then I was living at Punchbowl and Queen Streets.

Q. Then did he ever have any wife, servant, concubine or woman with whom he lived before his marriage to you? A. No.

Q. How old was he when you were married to him?

A. He was 28 years old—he is 65 years old now.

Q. Could you identify Ho She if you should see her now?

A. She left me 10 years ago I do not know whether I can or not. [264]

Mr. LAND.—When Ho She came to Honolulu were you living at Queen and Punchbowl Streets?

A. Yes.

Q. Did she come direct to your house when she came to Honolulu?     A. Yes.

Q. How long did she stay in that house on Queen and Punchbowl Streets?     A. About 12 years.

Q. Did she stay with you in that same house until she left and went to China?

A. No, she went to live in the store at the corner of King and Liliha my husband ordered her to look after that store there.

Q. Then she lived with you about 12 years at the corner of Queen and Punchbowl then she left and went to Liliha Street?     A. Yes.

Q. And you staid at Queen and Punchbowl?

A. Yes.

Q. When she returned to China she was living at King and Liliha Street?

A. She went to China a week after I returned here.

Q. When you came back you went to Queen and Punchbowl Streets to live?

A. When I came back I went to the house at the corner of Queen and Punchbowl staid there 2 nights my daughter was living there then, one of my daughter-in-laws was living at the corner of King and Liliha Streets and Ho She was living opposite side of the King market.

Q. Where was Ho She living at the time you went to China in 1907?     A. Liliha Street.

Witness identifies applicant as Ho She, but Ho She refused to identify the witness and says she does not know her.



Q. Have you any further statement to make?

A. No.

X

4393/1—4382/212

12/10/21 [265]

LAU AH LEONG recalled, testifies:

Q. We are informed that you were indicted for the offense of polygamy before the United States District Court in 1909 and a copy of the indictment has been furnished to us in which it is charged that you married a woman by the name of Hung She in 1886 and that you married a woman named Ho She otherwise called Ah Keau in 1908 and it is alleged that you pleaded guilty to that offense and were fined \$500 and sentenced to one hour of imprisonment, is it true that such was the case?

A. Yes, one was married to me and one was not—the woman that is coming here was married to me.

Q. Did you plead guilty of that charge?

A. Yes.

Q. If you pleaded guilty to that charge that is equivalent to an admission on your part that Hung She is your wife because if you had not married both of them you would not be guilty but when you pleaded guilty, that would mean that you married both of those women?

A. I had only wife that is the one that is married to me with the certificate but if the Government wants to fine me I have nothing to do.

Q. It says that you entered a plea of *nolo contendere*, which means that you did not resist the case and that you permitted sentence to be

entered against you—if you really only married one wife why did you not fight the case—you must at least had thought that you were married to both of them otherwise why should you permit yourself to be punished for a crime if you really believed that you were innocent?

A. I had no lawyer I was on trial by myself—one time with a lawyer and one time without.

Q. Which time was with the lawyer?

A. The last time.

Q. According to these papers we have received the last time you were charged with polygamy and the first time you were charged with co-habiting with more than one woman—if you acted on the advice of a lawyer the last time then at least your lawyer must have considered that there was no use of fighting the case and that you were guilty and therefore you must have thought that Hung She was your lawful wife because of course the lawyer acted on the facts as you told him—I wish also to call your attention to the fact that Hung She has already testified in this case and she says that when she first came to Hawaii about a month after she came she went to Kohala, Hawaii, and was there married to you according to Chinese custom that you had a wedding feast and so far as she knows all the formalities of a marriage were observed, and that she thought and considered herself as being your lawful wife and that you treated her as your lawful wife and had four children born of her before Ho She came to Hawaii at all, is that true?

A. No, I married the second wife when my first wife had two children before marrying Ho She I asked Hung She if she wanted to marry me and she said no I only want the money so I asked her if I could marry another woman and she said alright so I married this present wife.

Q. Is it not a fact that you have sold pieces of land to different parties and that Hung She has joined with you in signing the deeds as your wife releasing her right of dower in the conveyances which you have made?

A. When I sell my land the buyer wants the signature of my wife I said that my wife was in China but the buyer said this woman's signature will do.

Q. Did you ever sell any land to any person telling him that your wife was in China and yet he was contented to take the signature of a woman here who was not your wife?

A. I had a piece of land given to the son of Hung Dai Kam (Hung She) and he sold it to Mr. Magoon—Mr. Magoon found out I was married to this Ho She and he required her signature—at that time Ho She was here and she signed her name giving her consent.

Q. When was that?

A. About 20 years ago—that was the first time the buyer asked for Ho She's signature—afterwards the buyer of the land did not ask for Ho She's signature.

Q. It seems if the buyer if he was at all wise would have asked you to bring your wife and have her sign it and that you would have brought the

woman that you thought was your wife—if you brought Hung She and said that she was your wife—how would the buyer know any different—the buyer generally takes your word as to who your wife is and if you did not regard Hung She as your wife why did you permit her to sign the deed whether or not the buyer asked for it? [266]

A. I never asked her to sign a deed—when the buyer buys land he asks for my signature and I never refer to them that Huns She is my wife.

Q. You are a man that has had a great deal of experience and done a great deal of business, been in Hawaii a great many years, it is difficult to believe that you don't know any better than what you are pretending—you must know better than that—did you want to deceive the men that were buying the land—did you want to sell them land when they really were not getting a good title to it—nobody that buys land is safe in taking it unless the real true wife signs it because if you should die she would come and take  $\frac{1}{3}$  of the land as her right of dower and hold it for the rest of her life—you are not giving them a good title to it—when I sell land I must have a lawyer to investigate about the land before selling it.

Q. No lawyer is going to do such foolish things as fixing up a deed for you without getting your wife to sign it—the one that fixes the deed asks my wife to sign it but I never ask her to sign it—

Q. Whether or not Hung She was really your lawful wife is it not a fact that nevertheless at the first time when she came here and after she came



until the other woman came that you really considered her as your wife and thought she was your lawful wife—at that time?

A. No, I paid her every week, if she did not want me to marry another wife she would regard me as her husband. The only thing she wanted is money so she gave her consent to marry this woman.

Q. Did she give her consent to you to marry the other one?

A. She did not give me her consent but she allowed me to marry another woman.

Q. Now, I wish to ask you again directly did you or did you not consider Hung She as your wife before Ho She came? A. No.

Q. And yet you lived and cohabited with her and had children by her did you? A. Yes, I did.

4382/212—4393/1

12/13/21 [267]

Applicant HO SHE recalled, testifies:

Q. Where have you been living in China?

A. Hong Kong.

Q. How is it your son says that you and he have been living in the home village?

A. No, I lived with my mother at Hong Kong my son sometimes went to the village to attend school.

Q. If you and your son lived in Hong Kong why would he make a statement like that?

A. I never went to the village except my son he went once in a while.

Q. Do you know a woman by the name of Wong She? A. My mother is Wong She.

Q. How many wives has your husband?



A. I do not know.

Q. Isn't Wong She one of his wives who lives in the home village and isn't it a fact that you have been living in the same house with her in China?

A. No.

STATEMENT BY INSPECTOR FARMER.

I have been to the office of the Board of Health and searched the record of marriage licenses—the record is not complete as to licenses issued in Kohala, Island of Hawaii in the 80's—there is a record of a few and among them I found that a license was issued to a man by the name of Aliona to marry a woman by the name of Pahela—Aliona might possibly refer to Ah Leong and Pahela is an Hawaiian name—it was issued in 1883—no ages were given—the date was August 27, 1883, that is all the information.

NOTE: A communication has been sent to Mr. S. C. Huber, United States District Attorney informing him of the fact in this case and asking his opinion as to who is the legal wife of Lau Ah Leong and whether Ho She is a citizen if she is his wife—his reply has been received.

LOUIS N. LAND.—I move that the letter sent to Mr. Huber and his reply be placed on file in the records of this case.

MARTHA MAIER.—I second the motion.

EDWIN FARMER.—I concur.

STATEMENT BY INSPECTOR FARMER.

In my opinion Hung She ought in justice to be considered as the lawful wife of Lau Ah Leong—

she has been living with him and had a large number of children by him and has given him material assistance to amass a large fortune but from the opinion of the United States Attorney as to the law I feel compelled hold that Ho She is the lawful wife—the marriage of Lau Ah Leong to Ho She in 1891 was accompanied by all the requirements of law including the securing of a license—the marriage to Hung She in 1883 followed by her cohabitation with Lau Ah Leong satisfied all the requirements of law so far as I can see with the exception that there is no evidence that a marriage license was procured and as the Supreme Court of the Territory has held that a license is absolutely necessary to constitute a valid marriage and as in Mr. Huber's opinion we cannot presume that a license was issued to Hung She but must have positive proof of it under the circumstances of this case or else the marriage is void and as no evidence has been adduced and there is no likelihood that it can be adduced showing that a license was issued for the marriage to Hung She, I am forced to the conclusion that Ho She is the lawful wife and as Lau Ah Leong is a citizen she is admissible as the wife of a citizen under the Chinese Exclusion law—in my opinion there is no ground for denying the applicant under the Immigration law although she is an alien and therefore I see no course open to us but to admit her, however unworthy she may be.

## MOTION.

LOUIS N. LAND.—I move that the applicant Ho She be admitted as the wife of a naturalized citizen, and that Lau Chong be admitted as Hawaiian Born.

4393/1—4382/212

12/19/21 [268]

MARTHA MAIER.—In this case I cannot agree with the majority of the Board and believe that this applicant Ho She should be denied admission for the following reasons—that she is a person who believes in and has practiced polygamy this is shown by the fact that her alleged husband was convicted upon two different occasions in the local Federal court for bigamy—at that time the Parke vs. Parke decision had not been rendered but the courts in this Territory were working under the Godfrey-Rowland decision, a copy of which is a part of the record in this case. The records show that the alleged husband has still another wife in China who has a son by him and the testimony of the 12-year-old son of this applicant shows that his mother and the #3 wife Wong She had been living together in the same house in China—and the testimony of the alleged husband in 1910 shows that Hung She and this applicant Ho She were his wives, at that time he testified that Hung She was *was* his first wife—that Ho She was the second, and from his convictions in the local Federal Court it shows that he did live and cohabit with these two women in Hawaii and it is common knowledge that they did live together here in one house in this city although this applicant Ho She disclaims any knowledge of

Hung She and the woman who is now living in China known as Wong She and by stating that she did not live in the home village but staid in Hong Kong which is contradictory to the testimony of her son and to the testimony of her alleged husband L. Ah Leong she offers as the excuse for not living in the home village that the house was old and broken down but the testimony of Hung She in 1910 shows that the house was built only about 7 years previous to that *that that* while L. Ah Leong was in China at that time he married this woman, Wong She, so as to leave in charge of the house.

From the testimony offered by all parties concerned, other than Ho She, it appears that Ho She does know Hung She, who is now in Hawaii, and the woman in China that is named Wong She—it therefore appears that she knows well her alleged husband's marital relations with these two women, and knowing this and still continuing to live with him and be supported by him and returning here to join him she certainly believes in and practices polygamy.

Even if Hung She, who is here in Hawaii is not the lawful wife of Lau Ah Leong he still has the #3 wife, Wong She, in China. By this applicant Ho She disclaiming all knowledge of Hung She who has appeared at this office, testified in this case and identified this woman, it shows that the applicant thought that if she said that she knew Hung She and that Hung She was one of the wives of her alleged husband that she would be denied admission therefore she tried to gain admission by



making false and misleading statements to the Board of Special Inquiry—it might be well to know that if the woman Ho She had never been in Hawaii before and was coming here for the first time and there were as many discrepancies between her statement and her alleged husband's statement as there are in this case, she would be denied on the ground that she had not proved that she was the wife of the person to whom she came to join. In this case it seems that her actions speak louder than words.

4393/1—4382/212.

12/19/21 [269]

EDWIN FARMER.—I concur with Mr. Land's motion. There is plenty of evidence to show that Lau Ah Leong is a polygamist and there is no evidence, so far as I can see, to show that Ho She is a polygamist or believes in polygamy although there are discrepancies in the testimony and she does not admit having committed a crime or misdemeanor involving moral turpitude, although we may believe that she does not tell the truth about certain facts because her testimony differs from that of the others this is not a ground for denying her admission.

MARTHA MAIER.—I cannot agree with the majority of the Board and appeal from the landing decision.

EDWIN FARMER to APPLICANT.—You are informed that the majority of the Board of Special Inquiry have voted to admit you but one member has dissented from the majority of the Board and voted to deny you on the ground that you are a



person who believes in and practices polygamy and as a person who has made false and misleading statements to the Board of Special Inquiry, and has appealed from the decision of the majority of the Board. You have the right to an attorney to represent you on appeal if you so desire—should the appeal be sustained you will be returned to China at the expense of the owners of the steamer on which you came, in the same class as that in which you came, namely, steerage—but if the appeal is dismissed you will be admitted. I concur as to the admission of Lau Chong—Hawaiian Born.

Certified to be correct.

MARTHA MAIER,  
Stenographer.

4393/1—4382/212

12/19/21 [270]

December 15, 1921.

Hon. S. C. Huber,  
United States District Attorney,  
Honolulu, T. H.  
(Through Inspector-in-Charge.)

Dear Sir:

Would you kindly express your opinion for the benefit of the Board of Special Inquiry as to certain questions of law in a case now before them on which the admission or rejection of the applicant for admission to the United States seems to depend?

The facts are substantially as follows: Mr. Lau Ah Leong, who was naturalized as a citizen of Hawaii before annexation, was married by Chinese custom in Kohala, Hawaii, about 1883 to a Chin-

ese woman named Hung She, also known by other names, shortly after her arrival from China. Whether or not a marriage license was secured we are unable to say. He lived and cohabited with her and represented her as his lawful wife from that time until within the past year. She made one trip to China during that time, in 1907, and returned in 1910. He has a large number of children by her, several of whom were born in the '80's.

In 1891 another woman came from China and Lau Ah Leong was married to her by a minister authorized to perform the marriage ceremony and a license was procured. Her name is Ho She and she is also known by other names. He has a large number of children by her also.

He was charged with bigamy in the U. S. District Court in 1910, the indictment alleging that he was married to these two women and mentioning Hung She as the woman to whom he was married first. The plea of "*nolo contendere*" was entered and he was sentenced to pay a fine of \$500.00 and one hour's imprisonment.

Several deeds have been presented wherein Lau Ah Leong conveyed land, some of them of very recent date, and Hung She joined with him in these deeds releasing her right of dower as his wife.

When Hung She arrived from China in 1910 both of them testified that she was his lawful wife and he mentioned both wives and asserted positively that Hung She was the lawful wife.

From these facts we conclude that he at least

thought Hung She was his legitimate wife whether she was or not.

Shortly after he was sentenced for bigamy in 1910 Ho She went to China and has now returned and seeks admission as the lawful wife of a citizen. She disclaims all knowledge whatever of Hung She or any of her children, avowing that she never heard of such a woman and refused to recognize or identify her when the two were brought together, although the two lived together in the same house for ten years prior to 1907.

Lau Ah Leong also has had other wives but the evidence indicates that Hung She was the first. He married a woman named Wong She in China about six or seven years ago by whom he has one son. How many children he has by other wives or concubines I cannot say but he has several. [271]

If Ho She is the lawful wife she is entitled to admission as the wife of a citizen. We have considered Chinese women married to citizens prior to annexation as citizens themselves, but the State Department has not and has refused them passports unless accompanied by their husbands.

The question is, is Ho She the lawful wife of Lau Ah Leong, a citizen, and, if so, is she a citizen?

It is contended that, as sufficient facts have been shown to prove that Hung She is the lawful wife except as to the issuance of a marriage license, it will be presumed that a license was issued in the absence of proof to the contrary. Authorities to that effect have been cited. We know of the Parke decision by the local Supreme Court holding that

marriages celebrated in Hawaii without the license are void but how is it where we do not know whether a license was issued or not?

Hung She states that she does not know whether or not a license was issued but she supposed that everything was done properly and knew that Lau Ah Leong had some papers but cannot say that he had a license.

Lau Ah Leong, however, denies positively that he was ever married to Hung She at all or ever recognized her as his wife in any capacity, contrary to his own sworn statement in 1910. He wants Ho She to be admitted.

The fact that he did procure a license in 1891 and was regularly married to Ho She is sufficient to raise a presumption that the marriage was legal. The marriage certificate has been produced. The presumption of innocence is very strong. But nevertheless his conviction of the crime must be taken as evidence to the contrary. Perhaps now, since the Parke decision, it would not be possible to convict him of polygamy.

In either case, whichever of the two is the lawful wife, many children will be illegitimate.

The presumptions seem to be conflicting.

There is another point which has been raised. Consent is necessary to a valid marriage. Could Lau Ah Leong have given his genuine consent to his marriage with Ho She when he thought and considered Hung She as his lawful wife? Of course he gave what seemed to be his consent for the marriage certificate would not have been issued if he



had not. Can a man who has a lawful wife living give his consent to a marriage with another woman? And, as consent is a mental act, can he give such consent when he fully believes the first one to be his lawful wife, whether, by reason of some technical impediment, she is or not?

We would like to know whether, in your opinion, Hung She or Ho She is the lawful wife, or whether neither one of them is, or whether the woman he married in China, Wong She, is the right one.

Yours very truly,

(Sgd.) EDWIN FARMER,

Chairman Board of Special Inquiry. [272]

DEPARTMENT OF JUSTICE.

Office of

UNITED STATES ATTORNEY.

DISTRICT OF HAWAII.

Honolulu.

December 17, 1921.

Richard L. Halsey,

Inspector-in-Charge, U. S. Immigration,

Honolulu.

In compliance with request contained in letter of December 15, 1921, by Edwin Farmer, Chairman, Board of Special Inquiry, transmitted through you, I *bed* to submit the following opinion upon the law involved:

The facts which obtain, as I gather them from said letter, are as follows:

That Lau Ah Leong, whom I know to be a Chinese by birth, came to Hawaii during the days of the Monarchy and was duly naturalized as a



citizen of the Kingdom of Hawaii and has remained a resident of Hawaii since.

That about the year 1883, at Kohala, Hawaii, said Lau Ah Leong "was married by Chinese custom in Kohala to Hung She shortly after her arrival from China." You further state that said Lau Ah Leong and said Hung She have lived and cohabited together until within the past year, and that there is evidence that they jointly signed several deeds, Hung She releasing therein her right of dower as the wife of said Lau Ah Leong; that said Lau Ah Leong in 1910 testified before the proper officer of your Department that said Hung She was his lawful wife and at the same time mentioned another wife Ho She.

That in the year 1891, in the Territory of Hawaii, said Lau Ah Leong was married to Ho She, who had recently come to Hawaii from China; that a license therefore was procured and the marriage solemnized by a minister authorized to perform the marriage ceremony.

That about six or seven years ago, while in China, said Lau Ah Leong there married a woman named Wong She.

That said Ho She, to whom said Lau Ah Leong was married in 1891, is now applying for admission to Hawaii as the lawful wife of said Lau Ah Leong, a citizen. [273]

You ask the following questions:

1. Is Ho She the lawful wife of Lau Ah Leong?
2. If such lawful wife, is said Ho She a citizen?

3. Is Wong She the lawful wife of Lau Ah Leong?

The regulation of the marriage relation is exclusively within the power of the several states. Hawaii, being a Territory, Congress might legislate on the subject, but has not done so; therefore, the laws of Hawaii control in this jurisdiction.

I have examined the statutes of Hawaii on this subject and find that the law as stated in Section 2905, Revised Laws of 1915, is almost identical with that used in Chapter XXIII, Act of 1872, Section 1, which was the law in force in the Kingdom of Hawaii in 1883, at the time it is stated that said Lau Ah Leong was married to Hung She, and as it was in the year 1891, when it is shown that he was married to Ho She: that is, there is no substantial difference in those parts of the statutes referred to which are determining in the case of *Parke vs. Parke*, 25 Haw. 397.

Section 8, R. L. 1915, which is applied in the case of *Parke vs. Parke*, is identical with the law in force in the Kingdom of Hawaii in 1883; and, from that date to the present.

Said case of *Parke vs. Parke* holds that a license is a prerequisite to a valid marriage in the Territory of Hawaii and that "common-law" marriages are void.

Since deciding said case of *Parke vs. Parke*, the Supreme Court of Hawaii, "In the Matter of the Estate of Kekoa Kalamau, Deceased," 26 Haw. 81, in a proceeding for the distribution of the estate says:

“This court held in *Parke vs. Parke*, 25 Haw. 397, that a license is a prerequisite to a valid marriage in this Territory. But where, in a proceeding of this nature, the marriage is established by reputation, it will be presumed *in the absence of any showing that would repel such conclusions* that the parties were legally competent to marry, that they first procured a license and complied with all other requirements necessary to make valid the marriage contract.” See 1 Bish. Mar. & Div. 6 ed. Sec. 457.

Under the rules of evidence to be applied in determining the questions of fact involved before you, there is the rule which holds that where a marriage is established by reputation, it will be presumed to be regular, as stated in the *Kalamau* case above.

There is a further rule which favors the validity of a second marriage where said second marriage is shown to be solemnized in the manner required by law, which presumption is uniformly held to be stronger than the presumption which favors the continuance of a first marriage. [274]

On this latter proposition the courts have said:

“There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged the presumption of death in less than seven years;

or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce . . . .

*A charge of an act of immorality, or of disobedience of a positive law, will not be received unless supported by direct evidence. Circumstances showing probability merely are not enough; the fact averred must be conclusively proved."* (Hunter vs. Hunter (Cal.) 43 Pac. 756.)

In *Schmisseur vs. Beatrice*, 147 Ill. 210, it was proven that an absent husband was alive at the time of the marriage, and the Court held in favor of the second marriage,—that it would be presumed that the absent party had obtained a divorce and that the burden of proving such divorce had not been obtained was on the party alleging the invalidity of the second marriage.

In *Pettinger vs. Pettinger*, 64 Pac. (Col.) 195, the court uses this language:

"No man is presumed to do an unlawful act. When a marriage has been shown, the law raises a strong presumption in favor of its legality. By some authorities this presumption is said to be one of the strongest known to the law. . . . It is contended, in behalf of the applicant, that the marriage of deceased to his first wife having been shown, this is sufficient to overcome the presumption in favor of the legality of the marriage between deceased and appellee. . . . *The presumption of the continuance of the first marriage,*



*based upon the naked fact that it was solemnized, is not equal in probative force to the presumption in favor of the legality of appellee's marriage."*

In this case the court indulged the presumption that a divorce had been granted and says:

"It is not impossible that he might have instituted proceedings for divorce and the first wife not have received a copy of the summons, even though mailed to her." And further employs this language relative to the surviving wife, appellee in the case:

"If she is deprived of any rights, not resulting from any wrongful act of hers, but from the misconduct of another . . . appellant has no claim upon the bounty of the deceased, and, *in so far as her rights are dependent upon the fact that he has been guilty of a violation of the laws of the land*, the principles of natural justice require that *the evidence to that effect should be sufficiently convincing to admit of no other reasonable hypothesis."*

In *re Sloan Estate* (Wash.) 69 Pac. 684, there were two marriages; the first being conclusively proved, the Court says:

"We are not unmindful of the fact that the presumption that ordinarily attaches to the first marriage is now transferred to the second, and that stronger proof of the validity of the first marriage is required than if the second did not exist. *The presumption which*



*attaches to the second marriage [275] however, only overcomes a presumption of marriage arising from reputation and cohabitation and is not sufficiently strong to overcome such proofs of marriage as are found in this record."*

You will note from the quotation given above that the burden of proof is placed upon the person attacking the validity of the second marriage, and is well stated in the case of *Patterson vs. Gaines*, 47 U. S. at page 596, where the Court employs this language: "The burden of proof in such a case is not upon the party asserting the validity of the second marriage, but on the other, who asserts its invalidity on account of the validity of the first."

You understand clearly that I would be invading your province if I attempted to determine the facts in this case, and my aim is simply to present my opinion of the law, which should guide you in the determination of the facts.

If you find from the evidence before you that the marriage to Hung She was a valid marriage, solemnized in conformity to the laws of Hawaii, then and in that event the marriage to Ho She would be invalid and she would not be the wife of a citizen and would not be entitled to admission to the Territory.

If you find from the evidence that the marriage to Ho She in 1891 was solemnized in conformity with the laws of the Territory of Hawaii, then and in that event this marriage, so established, would repel the presumption of the regularity of the marriage to Hung She in 1883; and before you

would be justified in finding the marriage to Hung She in 1883 to be a valid marriage, you would require satisfactory and conclusive evidence that that marriage had been solemnized in the manner required by law (i. e., "that they first procured a license and complied with all other requirements necessary to make valid the marriage contract")—its validity could not be sustained by mere presumption.

In other words, if the marriage to Ho She in 1891 is shown to have been solemnized in the manner required by the laws of the Territory of Hawaii (i. e., "that they first procured a license and complied with all other requirements necessary to make valid the marriage contract"), that raises a presumption that the marriage to Hung She in 1883 was a "common-law" marriage and therefore void under the holding in the case of *Parke vs. Parke*, which case controls in this jurisdiction. However, the presumption is one that may be overcome, but only by positive and conclusive evidence that the marriage to Hung She in 1883 was solemnized in conformity with the laws of the Kingdom of Hawaii.

If you find from the evidence that the marriage to Hung She was a "common-law" marriage and you further find from the evidence that the marriage to Ho She was a marriage in conformity with the laws of Hawaii, then and in that event Ho She is the lawful wife of a citizen and entitled to admission as such.

Said Lau Ah Leong, by virtue of his naturali-

zation as a citizen of the Kingdom of Hawaii, became a citizen of the Republic of Hawaii under the provisions of the constitution of said Republic; and, by virtue of the provisions of the Organic Act, became and is a citizen of the United States.

Ho She is not a citizen of the United States. The laws of the Kingdom of Hawaii did not provide that the wife of a person becoming a citizen of the Kingdom by naturalization thereby became a citizen herself. Therefore, Ho She was not a citizen of the Kingdom of Hawaii and did not become, and is not, a citizen of the [276] United States under the provisions of the Organic Act.

Inasmuch as it is believed that the law, as hereinabove discussed, is sufficient to determine whether or not Ho She is entitled to enter the United States, it is deemed unnecessary to discuss the other questions referred to in your letter.

Respectfully,

(Sgd.) S. C. HUBER,  
United States Attorney. [277]

THIS  
CERTIFIES

That on the twenty-fifth day of May in the year or our Lord 1891, LEW AH LEONG and AH KEAU were by me united in MARRIAGE at my residence, 122 Beretania St.

Attest:

Witness: AH LO.

C. M. HYDE.

LUNA HOOHO MARE. [278]

## CERTIFICATE OF MARRIAGE.

Territory of Hawaii.

BUREAU OF VITAL STATISTICS,

Honolulu, T. H.

A. 122

I, THE REGISTRAR-GENERAL OF VITAL STATISTICS, do hereby certify the following to be a true and correct copy of the Record of Marriage of

LEW AH LEONG and AH KEAU

as set forth on page 3 of the official Record of Marriages for the District of Honolulu, Island of Oahu, kept in the Bureau of Vital Statistics, Honolulu, Office of the Board of Health of the Territory of Hawaii.

Name of Groom—Lew Ah Leong	Age—Years.	Bachelor Widower Divorced
Nationality—	Residence	
Name of Father—	Name of Mother	
Name of Bride—Ah Keau	Age—Years.	Maid Widow Divorced
Nationality—	Residence	
Name of Father—	Name of Mother	
License Issued by C. T. Gulick	Date of License—May 24, 1891.	
Date of Marriage—May 25, 1891	Place of Marriage—Honolulu	
Marriage performed by C. M. Hyde		
Names of Witnesses—Ah Lo		
Date Recorded—		Registrar.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the official seal to be affixed, at Honolulu, City and County of Honolulu, this 5th day of August, 1921.

[Seal]

(Sgd.) M. H. LEMON,  
Registrar-General. [279]



AMERICAN CONSULATE GENERAL.  
HONG KONG, CHINA.

Colony of Hongkong,  
City of Victoria,  
Consulate General of the  
United States of America,—ss.

On this twelfth of November, one thousand nine hundred and twenty-one, personally appeared before me, Consul of the United States of America at Hong Kong, China, one Ah Keau, who being first duly sworn, according to law, on oath, deposes and says:

That I am a lawful wife of Lau Ah Leong, a Chinese merchant in the city and county of Honolulu, Territory of Hawaii; that I returned to China from Honolulu in the year 1910 with three children; that it is now my intention of returning to the United States, that the photograph hereto attached is the correct likeness of myself, so as to aid and facilitate my landing at Honolulu.

her  
AH X KEAU.  
mark

Witnesses:

TSAYO YONG LUK.  
YOUNG FOON TONG.  
(PHOTOGRAPH HERE  
ATTACHED.)

Subscribed and sworn to before me this 12th day  
of November, 1921.

[Seal] (Sgd.) LEIGHTON HOPE,  
Consul of the United States of America.



PRESENTED AT	No. 7002	Misc.
AMERICAN CONSULATE		Fee
GENERAL AT HONG KONG.		No.
For journey to the United States		3506

via China and Japan.

(Seal) LEIGHTON HOPE (Seal)

Nov. 12, 1921 (Consul)

(Valid only for sixty days.)

(\$2 American Consular Service Fee  
Stamp attached  
Nov. 12, 1921,  
American Consulate - General,  
Hong Kong.)

(\$10 American Consular Service  
Fee Stamp attached Nov. 12, 1921,  
American Consulate-General, Hong  
Kong.) [280]

## U. S. DEPARTMENT OF LABOR.

### IMMIGRATION SERVICE.

File No. 4393/1 -4382/212.

Port of Honolulu, T. H.

### RECORD OF BOARD OF SPECIAL INQUIRY.

In the Matter of the Application of HO AH KEAU,  
Alleged Wife of a Citizen—LAU CHONG—  
Hawaiian Born -1-12, "Siberia Maru"—  
12/7/21—for Admission to the United States.

Convened—DECEMBER 9, 1921.

Chairman—EDWIN FARMER.

Member—LOUIS N. LAND.

Member—MARTHA MAIER.

Interpreter—HEE SOU HOY.

Typist—MARTHA MAIER.

BRIEF ON BEHALF OF APPLICANT.

STATEMENT OF THE CASE.

HARRY IRWIN,

J. LIGHTFOOT,

Attorneys for Applicant. [281]

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

File No. 4393/1 -4382/212.

Port of Honolulu, T. H.

RECORD OF BOARD OF SPECIAL INQUIRY.

In the Matter of the Application of HO AH KEAU,

Alleged Wife of a Citizen—LAU CHONG—

Hawaiian Born -1-12, "Siberia Maru"—

12/7/21—for Admission to the United States.

Convened—DECEMBER 9, 1921.

Chairman—EDWIN FARMER.

Member—LOUIS N. LAND.

Member—MARTHA MAIER.

Interpreter—HEE SOU HOY.

Typist—MARTHA MAIER.

BRIEF ON BEHALF OF APPLICANT.

STATEMENT OF THE CASE.

The applicant, Ho Ah Keau, also known as Ho Shee, wife of a citizen, L. Ah Leong, arrived at the port of Honolulu aboard the SS. "Siberia Maru," on the 7th day of December, 1921, and was held at

the Immigration Station for examination before a Board of Special Inquiry, the question before the board being as to the validity of her marriage to L. Ah Leong. After a lengthy examination as to the facts of the marriage, the question of the legality of the marriage was submitted to the Hon. S. C. Huber, U. S. District Attorney for the Territory of Hawaii, who advised the Board of Special Inquiry that if they found as a fact that L. Ah Leong and Ho Shee had been legally married, that is to say, had received a license to marry, as provided by law, and had gone through a marriage ceremony by one authorized by law to perform the same, then Ho Shee was the legal wife of L. Ah Leong and he, being a citizen, she had the right to land. (See letter to Mr. Huber.)

At the conclusion of the hearing, the majority of the board decided to admit the applicant, but Mrs. Martha Maier appealed from the decision of the majority of the board on the ground that Ho Shee, the applicant, should be denied admission for the following reasons:

- (1) That she is a person who believes in and has practiced polygamy;
- (2) That Ho Shee, the applicant, had made false and misleading statements before the Board of Special Inquiry. (Transcript of Evidence, page 17.)

## ARGUMENT.

### THE BOARD OF SPECIAL INQUIRY CORRECTLY FOUND THAT HO SHE IS THE LAWFUL WIFE OF L. AH LEONG.

It appears from the record that 38 years ago Hung She, *alias* Hung Dai Kam, went through some kind of a marriage ceremony with L. Ah. Leong, but whether the ceremony imported the taking of a wife or the [282] taking of a concubine does not appear. It is certain, however, that no license was obtained as required by the laws of the Kingdom of Hawaii, and no ceremony was performed by a person thereunto authorized as required by law. In 1905 the case of Godfrey versus Roland was decided by the Supreme Court of the Territory it being held that "in order to prove a legal marriage it is not necessary to prove that a license to marry was issued. The license to marry will be presumed by the celebration of the marriage, nor need any ceremony be shown to prove a marriage." And from that time it was considered to be the laws of this Territory that a so-called common-law marriage was both legal and valid. A copy of the opinion in the Godfrey vs. Roland case is contained in the record.

On April 6, 1920, the Supreme Court of the Territory, in the case of Parke vs. Parke, 25 Haw. 397, reversed the Godfrey vs. Roland case, holding as follows:

#### "Marriage—License.

It is provided in section 2905 R. L. 1915 (Sec. 1870, Civ. L. 1897), that 'it shall in no

case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from an agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated.' This provision while clearly prohibitory contains no words of nullity.

"Same—Same.

Section 8 R. L. 1915 (Sec. 8, Civ. 1, 1897), which reads: 'Whatever is done in contravention of a prohibitory law is void although the nullity be not formally directed,' expressly renders null whatever is done in contravention of a prohibitory law. These two sections must be considered *in pari materia*.

"Same—Same.

A license is a prerequisite to a valid marriage in this Territory. Marriages *per verba de praesenti*, as recognized by the common law, are void here. *Godrey vs. Rowland*, 16 Haw. 377, holding to the contrary, overruled."

Under this decision the ceremony performed by L. Ah Leong with Hung She did not constitute a valid marriage in the Kingdom of Hawaii and does not now constitute a valid and legal marriage in the Territory. This subject is clearly and succinctly discussed in the opinion of the Hon. S. C. Huber attached to the record, and we do not feel that it is necessary to enlarge on the subject further here.



THE APPLICANT IS NOT A POLYGAMIST;  
SHE DOES NOT BELIEVE IN NOR HAS  
SHE PRACTICED POLYGAMY.

It is clear from an examination of the record that Ho She is the lawful wife of L. Ah Leong. She received a license to marry and was married by a person thereunto authorized as provided by law and there is no evidence in the record from one end to the other that L. Ah Leong was lawfully married to any other person, so that L. Ah Leong himself could not, under the evidence, be held to be guilty of the crime of polygamy. It is true that in 1910, for some reason very difficult to [283] ascertain, L. Ah Leong in the District Court of the United States entered a plea of "*nolo contendere*" to an indictment charging him with the crime of bigamy. A prosecution for that crime at the time of indictment had been long barred by the statute of limitations, a fact of which Mr. L. Ah Leong seems not to have been advised. It also seems that, in entering his plea to the indictment, he was governed by the law laid down by *Godfrey vs. Roland*, which was afterwards reversed but, as pointed out above, he was never guilty of the crime of polygamy. He says that he never had any other wife except Ho She. (Transcript of evidence, page 7.) He says that Hung She wanted to live with him but did not want to get married to him (Transcript of evidence, page 8), and as pointed out above, there is no evidence of any lawful marriage to any woman other than Ho She and therefore there is no evidence of polygamy on the part of L. Ah Leong.

THERE IS NO EVIDENCE THAT HO SHE  
EITHER PRACTICED OR BELIEVED IN  
POLYGAMY.

She was lawfully married to L. Ah Leong when she was 18 years of age. (Transcript of testimony, page 3.) There is not a word in the record showing or tending to show that she either practiced polygamy or believed in its practice. She was asked the question,

“Q. I ask you if you think it is right for a man to have more than one wife at the same time?”

Her answer was “No” (Transcript of testimony, page 5), and in spite of the very severe cross-examination by the members of the Board of Special Inquiry she never admitted either that she had practiced polygamy or that she believed in its practice. We therefore respectfully submit that the contention of Mrs. Maier that the applicant should be denied because she is a person who believes in and has practiced polygamy is without ground and should be overruled.

THE APPLICANT DOES NOT COME WITHIN  
ANY OF THE EXCLUDED CLASSES.

An examination of the transcript of the testimony shows that Ho She's regard for the truth was not of the highest order, but it is nowhere provided in the immigration law that an alien shall be excluded if he fails to tell the truth before a Board of Examiners. It is true that when a witness makes a false statement before the Board of Examiners that board may, by reason of such false statement, dis-

credit any other statement made by the witness and if in this case the Board of Special Inquiry believed that Ho She had testified falsely on one subject they might apply the maxim "*falsum in uno, falsum in omnibus*" and disregard all her evidence. But the main fact before the Board of Inquiry, namely, the marriage, did not rely or did not depend upon the testimony of Ho She. It was the uncontradicted testimony of her husband, L. Ah Leong, and the uncontroverted testimony of the marriage license and the records of the registrar-general. And the board was at liberty to find, and did find, from evidence other than that of Ho She, that the marriage to L. Ah Leong had in fact been entered into and was a valid and lawful marriage. Section 16 of the Act of February 5, 1917, provides as follows: [284]

Any person to whom such an oath has been administered under the provisions of this act, who shall knowingly or willingly give false evidence or swear to any false statement in any way *affecting or in relation to the right of any alien to admission* or readmission to or to pass through or to reside in the United States shall be deemed guilty of perjury and shall be punished as provided by Section 125, Act approved March 4, 1909, entitled "an Act to codify, revise and amend the penal laws of the United States."

The Act relating to perjury above referred to is as follows:

“Whoever, having taken an oath before a competent tribunal, officer or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly or that any written testimony, declaration, deposition or certificate by him subscribed is true, shall willfully and contrary to such oath state or subscribe *any material matter* which he does not believe to be true, is guilty of perjury and shall be fined not more than two thousand dollars (\$2,000.00) and imprisoned not more than five years.”

It appears from the foregoing that perjury can only be predicated upon false swearing to a material fact. Now, the material fact to be inquired into by the Board of Special Inquiry was the validity of the marriage of Ho She to L. Ah Leong. It was immaterial whether she knew other persons or had resided in other places. In fact, any false statement made by her, if any, were so made also on an immaterial matter and therefore could not be made the basis of a charge of perjury.

There is no evidence in the case that the applicant had ever been convicted of the crime of perjury and an examination of the transcript will show that she never admitted having committed such crime.

We therefore respectfully submit that the applicant, Ho She, did not come within any excluded class under the immigration law of February 5, 1917, or any other immigration law, and that the



Board of Special Inquiry was correct in ordering that she be admitted.

Dated, Honolulu, T. H., December 27, 1921.

(Sgd.) HARRY IRWIN,

(Sgd.) J. LIGHTFOOT,

Attorneys for Applicant. [285]

[Letter-head of Thompson, Cathcart & Ulrich.]

December 7, 1921.

Richard L. Halsey,  
Inspector-in-Charge,  
Port of Honolulu,  
Honolulu, T. H.

Dear Sir:

We are informed that a Chinese woman by the name of Ho Shee, otherwise known and called Ah Keau, claiming to be the wife of L. Ah Leong, a merchant of this City, arrived yesterday on the "Creole State," and is seeking admission into the Port of Honolulu. We beg to inform you that Ho Shee, otherwise known as Ah Keau, is not the wife of L. Ah Leong. That prior to an alleged marriage of Ho Shee and L. Ah Leong, L. Ah Leong was the lawful husband of Fung Dai Kin, who is now living, and that said marriage has never been dissolved.

We are enclosing herewith a copy of a complaint in divorce, on file in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, now pending, which in our judgment, sets out not only reasons for excluding Ho Shee, otherwise known as Ah Keau, who probably attempts to come in under the name of Mrs. L. Ah Leong, but also in our judgment, sets out sufficient reasons to permit an investi-



gation by your department, to the end that L. Ah Leong be deported as an undesirable alien.

We respectfully call this matter to your attention, and ask that through you, the complaint be forwarded to the Department, and that pending its decision, the applicant be denied a landing. We are taking the matter up direct with our correspondents in Washington.

Very truly yours,

FUNG DAI KIN AH LEONG,

Wife of L. Ah Leong.

By (Sgd.) F. E. THOMPSON,

Her Attorneys.

FET:L. [286]

[Letter-head of Thompson, Cathcart & Ulrich.]

December 7, 1921.

Richard L. Halsey,

Inspector-in-Charge,

Port of Honolulu,

Honolulu, T. H.

In the Matter of the Application of HO SHE,  
Otherwise Known and Called AH KEAU,  
Who Arrived Upon the "Siberia Maru,"  
and is Seeking Admission into the Port of  
Honolulu, as Wife of L. Ah Leong.

Dear Sir:

In the marginal matter, and referring to our letter of even date in which we erroneously stated that the applicant arrived on the "Creole State," instead of on the "Siberia Maru," we beg to state that much of the matter alleged in the complaint of divorce, in regard to the applicant, is a matter of

judicial record, and if you will inform us of the date of the hearing, and if you so desire, we will be pleased to direct you to sources from which corroboration of the fact that the applicant is not the wife of L. Ah Leong, can be obtained.

Very truly yours,

THOMPSON, CATHCART & ULRICH,

By (Sgd.) F. E. THOMPSON,

Attorneys for Mrs. L. Ah Leong, Wife of L. Ah Leong. [287]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

At Chambers—In Divorce.

No —.

### LIBEL FOR DIVORCE.

FUNG DAI KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.

### COMPLAINT.

Now comes Fung Dai Kim Ah Leong, of the City and County of Honolulu, Territory of Hawaii, libellant above named, and complains of L. Ah Leong, of the same place, in an action of divorce, and says:

#### I.

That the libellant and libellees are now and for

more than thirty-eight (38) years last past have been husband and wife; that during all of said 38 years they have been residents of the now Territory of Hawaii; that they now reside in the City and County of Honolulu, Territory of Hawaii; and that they last lived together as husband and wife in said City and County of Honolulu.

## II.

That they are living separate and apart.

## III.

That there have been issue of said marriage fourteen (14) children; that all said children have passed the age of minority, excepting Myrtle, a daughter, aged seventeen (17) years, and Mew Len, a daughter, aged sixteen (16) years.

## IV.

That for a period of twenty-nine (29) years and over, the said libellee has lived in open and notorious adultery with numerous women, including one Ah Keau, otherwise known as and called Ho Shee. That, as a result of this, his adulterous relation with said Ah Keau, otherwise known as Ho Shee, five (5) children were born to the said Ho Shee. That during the said period last mentioned he also lived in open notorious adultery with one Zane Shee, and as a result of said adulterous relation, three (3) daughters were born to the said Zane Shee. That during the said period he lived in open notorious adultery with one Chung Shee. And that during said period he lived in open and notorious adultery with one Wong Shee, and that, as a re-

sult of said adulterous relation, a son was born to the said Wong Shee. [288]

V.

That on the 12th day of April, 1907, the Grand Jury empanelled and sworn in the United States District Court for the Territory of Hawaii, found a true bill against the libellee in that within the jurisdiction of said court he did unlawfully cohabit with more than one woman, to wit: with a certain woman named Ho Shee, with a certain woman named Dai Kim (being Fung Dai Kim Ah Leong, libellant herein), and with a certain woman named Fung Shee (being the Chung Shee heretofore mentioned herein).

That thereafter, to wit: on the 17th day of April aforesaid, said libellee plead guilty to said charge contained in said bill, and thereafter, to wit: on the 17th day of April aforesaid, was sentenced to pay a fine of Three Hundred Dollars, which said sentence said libellee thereupon did duly perform.

VI.

That on or about the 1st day of March, A. D. 1910, in the District Court of the United States, for the Territory of Hawaii, an indictment, charging the said libellee with bigamy in that he did unlawfully and feloniously marry and take as his wife one Ho Shee, otherwise called Ah Keau, the person hereinabove referred to, the said libellee being then and there married to libellant, was found against said libellee; that thereafter, to wit: on the 2d day of April, 1910, upon a plea of *nolo contendere* having been thereto fore entered, the said libellee

was found guilty of bigamy as aforesaid, was sentenced to imprisonment for one hour and to pay a fine of \$500.00, all of which sentence said libellee thereafter performed.

#### VII.

That for more than twenty-nine (29) years last passed the said libellee has treated the libellant with extreme cruelty in this that he has forced her to associate and consort with the women aforesaid by whom he has had nine (9) illegitimate children as aforesaid; that he has forced libellant to occupy a position of servility to each of said women as she ascended in his affection; forced libellant to cook their meals, make and mend their clothes, and attend to the illegitimate children born thereof; that he has professed to libellant a preference for each of said women over libellant and has exhibited to the illegitimate children of said women greater affection than toward his lawfully begotten children.

#### VIII.

Libellant further alleges that in July, 1921, libellee suggested that she, said libellant, pay a visit to China, and that in accordance with said suggestion, libellant repaired to the office of the Inspector of the Port of Honolulu for the purpose of having a pre-investigation of her status under the Chinese Exclusion Act, in order that she might return to Hawaii without difficulty; that she requested libellee to give testimony to the Collector of said Port to the effect that she was the wife of a merchant and therefore entitled to travel;



that said libellee refused to give such testimony; that well knowing such statement to be false, and for the purpose of causing libellant mental suffering and pain, libellee stated that your libellant was not the wife and had never been the wife of libellee, that he recognized no wife other than Ho Shee, otherwise known and called Ah Keau, hereinabove referred to, and further stated that he was about to bring said Ho Shee, otherwise known and called Ah Keau, into the United States as his wife; [289]

That thereupon libellant informed libellee that she would refuse to live and cohabit with him until he rescinded his said false and malicious statement, and that ever since said last mentioned date libellant has refused to live and cohabit with the said libellee; that said libellee since said last mentioned date, has falsely and maliciously and for the purpose of inhumanly and cruelly subjecting libellant to mental suffering and pain, repeated to libellant and to diverse other persons his statement that libellant is not and never has been his wife.

### IX.

Libellant further states that on or about the 5th day of October, 1921, at Honolulu aforesaid, said libellee, in the presence of numerous persons, called libellant violent and opprobrious names, including the term, "Song Lee Ma," a Chinese expression which he intended to mean and which in colloquial Chinese is understood to mean, a married woman who cohabits with younger men than her husband; that he then and there told libellant to get out of the

house or he would kill her, raised his hand to assault her, and was only restrained by the interference of a lady friend of libellant's; that he thereupon turned upon libellant's lady friend, called her a whore, and said that she, like his wife, was looking for outside intercourse.

X.

That because of the extreme cruel treatment as aforesaid, libellant has become nervous and distraught, and believes that her life is in danger from said libellee.

XI.

Libellant further alleges that the libellee has property and effects of the reasonable worth and value of \$750,000.00, in excess of his liabilities; that all of said property has been acquired by the said libellee through the joint efforts of libellant and libellee; that at the time of their marriage, as aforesaid, libellant and libellee were residents of Kohala, Island of Hawaii, where libellee was engaged in the occupation of storekeeper, in partnership with one Liu Kon Yen; that said partnership on or about the time of the marriage of libellant and libellee was dissolved by virtue of the bankruptcy of the business and of libellee; that thereupon libellant and libellee moved to Honolulu, where libellee was engaged as a Clerk in the store of one L. Ahlo; that during the time said libellee was engaged as a Clerk in said store, libellant was engaged as a cook in the family of said L. Ahlo; that libellant and libellee continued in their respective capacities with said L. Ahlo for a period

of about ten (10) months, during which time, through their joint efforts, they had saved the sum of Eighty Dollars (\$80.00) with which sum together with Two Hundred Dollars (\$200.00), which libellant had saved out of the marriage contributions given to her according to the Chinese custom on the date of her marriage, libellant and libellee opened a grocery and general merchandise store in that portion of Honolulu now known as Kakaako, and that the funds so earned by libellant and libellee as aforesaid, and contributed by libellant as aforesaid, were and are the nucleus from which the present fortune of said libellee has accumulated; that said store conducted in Kakaako as aforesaid, was conducted under the name of Wing Fung Kee, the word "Fung" being libellant's family name, and the words "Wing" and "Kee" being Chinese words of description, commonly called in the Chinese vernacular, "store names"; [290]

That thereafter, and over a successive period of years, and up to and within ten (10) years from the date hereof, the business of libellant and libellee continued to progress; that additional stores were purchased out of the moneys jointly earned by libellant and libellee; that libellant stood watch for watch with libellee in said stores, sold and delivered groceries and merchandise, and in addition to doing all the house work and taking care of their children, libellant, first working by hand, and thereafter by sewing machine, made blouses, jumpers, overalls, petticoats, underwear, mumus and holokus for sale in said store; that libellant over a long

period of years and during the incipency of their business, delivered to customers of their stores, goods and wares there purchased; that as the deliveries became heavier, libellant used a wheelbarrow and subsequently a two-wheeled go-cart for the purpose of transporting merchandise purchased from the store.

That on or about the year 1892, under the pretext of having her work as a servant in the house and store, libellee brought into the home of libellant and libellee one Ho Shee, otherwise known and called Ah Keau; that immediately upon having installed her in the house as a servant, it came to the attention and knowledge of libellant that libellee and Ho Shee were unlawfully having sexual intercourse each with the other; that libellant protested and demanded that she be removed from the house, and upon libellee's refusal so to do, libellant took with her her minor children and left their said home, and that thereafter, as each of the persons hereinabove referred to as having successively had unlawful sexual intercourse with libellee, were brought into the house and home of libellant and libellee, libellant protested against the conduct of libellee, whereupon the libellee would state that if she didn't like the conditions, she could leave the house; and libellant further alleges that on four different occasions she has left the house because of such conduct and has returned thereto only upon the earnest solicitation of libellee and the promise that he would reform.



That said libellee is a general merchant with a store situate in Honolulu aforesaid; that part of his property consists of stocks and bonds and other negotiable instruments transferable by delivery; that said libellee threatens to give the illegitimate offspring of the women hereinabove mentioned all of his property in so far as he can do so; that to that end and purpose he had prepared Articles of Incorporation incorporating all of his business under the laws of the Territory of Hawaii; that he first begged, then cajoled, and afterwards threatened libellant regarding the signing of a conveyance conveying all of the real property into said corporation; that upon libellant's refusal so to do, he entirely cut off his support of her and told her to get out of the house.

## XII.

Libellant further alleges that unless protected by a Decree awarding to her alimony in gross, that the said libellee will dispose of his property and leave for China for the purpose of avoiding the payment of any monthly stipend awarded by this Court. [291]

WHEREFORE, libellant prays that she be granted an absolute divorce from said libellee; that she be awarded the custody of said two minor children; that the Court do award her alimony in gross in such amount as may seem meet and just, together with a just and reasonable sum for the education and maintenance of said minors; that she be awarded costs, expenses and attorneys' fees in this behalf.



Dated at Honolulu, T. H., December 5, 1921.

her

FUNG DAI X KIM AH LEONG.

mark

Libellant.

THOMPSON, CATHCART & ULRICH,

F. E. T.

Attorneys for Libellant.

Territory of Hawaii,

City and County of Honolulu,—ss.

Fung Dai Kim Ah Leong, being first duly sworn, on oath deposes and says: That she is the libellant named in the foregoing action; that she has had the foregoing Complaint translated to her, from English to the Chinese language; that she knows the contents thereof, and that the same is true.

her

FUNG DAI X KIM AH LEONG.

mark

Subscribed and sworn to before me this 6th day of December, 1921.

DOROTHY O. DAVIDS, (Seal)

Notary Public, First Judicial Circuit, Territory of Hawaii. [292]

In the Circuit Court of the First Circuit, Territory  
of Hawaii.

At Chambers.

FUNG DAI KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.

### DIVORCE SUMMONS.

The Territory of Hawaii:

To the High Sheriff of the Territory of Hawaii,  
or His Deputy; the Sheriff of the City and  
County of Honolulu, or His Deputy:

You are commanded to summon L. Ah Leong  
to appear Thirty Days after service hereof,  
before such Judge of the Circuit Court of the First  
Circuit as shall be sitting at Chambers, in his Court  
Room in the Judiciary Building in Honolulu, City  
and County of Honolulu to answer the annexed  
Libel in Divorce.

And have you then there this writ with full re-  
turn of your proceedings thereon.

WITNESS the Honorable Presiding Judge at  
Chambers and seal of the Circuit Court of the  
First Circuit, at Honolulu aforesaid, this 7th day  
of December, 1921.

B. N. KAHALEPUNA,

Clerk.

## SHERIFF'S RETURN.

Served the Within Summons on L. Ah Leong, this — day of December, 1921, by delivering to him a certified copy hereof and of the petition or libel annexed hereto and at the same time showing — the original, at —.

Dated December, 1921.

---

— Sheriff.

[On reverse side:] D. No. 8196. Reg. 11, p. 166. Circuit Court, First Circuit. — Libellant, vs. —, Libellee. Divorce Summons. Issued at 11 o'clock A. M. Dec. 7, 1921. B. N. Kahalepuna, Clerk. [293]

In the Supreme Court of the Territory of Hawaii.  
October Term, 1919.

No. 1177.

FRANCES L. PARKE,

vs.

JANE S. PARKE, ANNIE H. PARKE, BERNICE  
P. WALBRIDGE, and HAWAIIAN TRUST  
COMPANY, LIMITED, an Hawaiian Cor-  
poration, as Administrator of the Estate of  
WILLIAM C. PARKE, Deceased.

APPEAL FROM CIRCUIT JUDGE FIRST CIR-  
CUIT, HON. C. W. ASHFORD, JUDGE.

Argued February 24, 1920.

Decided April 6, 1920.

COKE, C. J., KEMP and EDINGS, J. J.

Marriage—License.

It is provided in section 2905 R. L. 1915 (Sec. 1870 Civ. L. 1897) that "it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from an agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated." This provision while clearly prohibitory contains no words of nullity.

Same—Same.

Section 8 R. L. 1915 (Sec. 8, Civ. L. 1897), which reads: "Whatever is done in contravention of a prohibitory law is void although the nullity be not formally directed," expressly renders null whatever is done in contravention of a prohibitory law. These two sections must be considered *in pari materia*.

Same—Same.

A license is a prerequisite to a valid marriage in this Territory. Marriages *per verba de praesenti*, as recognized by the common law, are void here. *Godfrey vs. Rowland*, 16 Haw. 377, holding to the contrary, overruled.

OPINION OF THE COURT BY COKE, C. J.

This is an appeal prosecuted by complainant-

appellant from a decree of the Circuit Court of the first judicial circuit sitting in equity dismissing her bill of complaint. A summarized history of the controversy is as follows: William C. Parke, a resident of Honolulu, died intestate on November 17, 1917, leaving an estate in the Territory of Hawaii consisting of real and personal property of the approximate value of \$250,000. Following his death and upon the petition of his sisters, the respondents Jane S. Parke, Annie H. Parke and Bernice P. Walbridge, and who claim to be heirs, the respondent Hawaiian Trust Company, Limited, a corporation, was by the probate court of the first judicial circuit duly appointed administrator of said estate. In July 1918 the administrator filed its final accounts together with a petition for the approval thereof [294] and for an order of distribution. The appellant, who styles herself Frances L. Parke, filed in the proceeding in probate a petition alleging that she was at the time of the death of William C. Parke his lawful wife and one of his heirs at law and as such was entitled to one-half of his estate. The respondents interposed pleas to the petition alleging that the three above-named sisters of William C. Parke are the sole and only heirs at law of decedent, denying that petitioner was his wife and setting up a release claimed to have been executed by the appellant under the name of Fannie Kunewa of January 26, 1918, whereby she had forever discharged the estate of William C. Parke and his executors, administrators and heirs of and from all manner of actions, suits



or demands in law and in equity which she might have had against the estate of William C. Parke or his representatives. The release reads as follows: "Know all Men by these Presents: That for and in consideration of certain payments of money made and to be made to me by William L. Whitney, trustee, of Honolulu, Territory of Hawaii, I, Fannie Kunewa, of said Honolulu, do hereby remise, release and forever discharge the estate of William C. Parke, deceased, his executors, administrators, heirs and assigns of and from all manner of actions, suits or demands in law or in equity, which against the said estate of William C. Parke, his administrators, heirs or assigns I have had, now have, or which my heirs, executors, administrators or assigns or any of them, can, shall or may have by reason of any matter, cause or thing whatsoever. In Witness Whereof I have hereunto set my hand this 26th day of January, 1919. (Sgd.) Fannie Kunewa. Witness to Signature (Sgd.) Wm. L. Whitney."

This release constituting a bar to petitioner's claim in the probate court she filed her bill in equity in the circuit court to have the respondents enjoined from using said release and for a cancellation thereof. The averments of the bill in equity set forth that the complainant (appellant herein) became the lawful wife of William C. Parke on the 13th day of November, 1912, and that she thereafter lived with him as his wife until the date of his death, November 17, 1917, and as such wife she is entitled to a distributive share of the estate; that complainant signed the purported release at

the instance of Wm. L. Whitney not knowing the contents thereof and under a misapprehension of the effect thereof; that at the time of the execution of the release she was in ill health; that she was confused and that she understood that she was merely signing a receipt for temporary maintenance and had no thought or intention that the document was in fact a settlement of, or in any way affected, her dower right in the estate. The respondents joined issue and voluminous testimony was introduced at the trial.

It is not claimed by the appellant that any license to marry was first obtained or that there was a marriage celebrated by the publication of bans or a public wedding of any nature, but she insists that she and William C. Parke by mutual consent and agreement took each other *per verba de praesenti* as husband and wife on the 13th day of November, 1912, and lived together as such until his death. In other words, it is contended by the appellant that her marriage to Parke was a common-law marriage as distinguished from a statutory marriage which prescribes that a license to marry must first be obtained and contemplates a ceremony conducted by a person duly authorized to perform marriages in this Territory. It is admitted that there are no children as the issue of this alleged marriage.

The judge of the court below in an opinion which admirably and adequately reviewed the law and the evidence found that the relations existing between appellant and Parke were meretricious rather

than matrimonial; [295] that there was neither a common-law marriage nor any marriage existing between the parties; and further found that appellant at the time she signed the release in question had no claim of any legal character against the estate of William C. Parke; that at the time she was not under misapprehension or duress nor was there any other circumstance which might warrant a revocation of the release.

It was argued in the court below by counsel for appellees that a common-law marriage is not valid in this Territory. But the trial judge having before him the opinion of this Court rendered in *Godfrey vs. Rowland*, 16 Haw. 377, where the validity of a common-law marriage in Hawaii is upheld he properly deemed himself to be bound by that opinion. Counsel again present the same argument here.

We, of course, labor under no such limitation as circumscribed the actions of the circuit judge but out of regard for the certainty and stability of the law this court would be loath to set aside one of its former decisions and especially where to do so property rights and personal relations might be disturbed. We think, however, that slight, if any, hardship would follow as a result of our refusal to acquiesce in the decision laid down in the *Godfrey-Rowland* case. If that decision is wrong it should be overruled at this time so that the public may not any longer be misled by it. It is generally better to establish a new rule than to follow a bad precedent. We therefore conclude that we owe it

to the community as well as to these litigants to review the Godfrey-Rowland opinion and to repudiate it if in our opinion it is unsound.

The Godfrey-Rowland case was an action of ejectment wherein it became necessary for the plaintiff to prove that Thomas Metcalf was the legitimate son of Frank Metcalf and hence that his parents were lawfully married. The court was construing the provisions of section 1870 Civ. L. 1897. That section, with amendments which are immaterial to this opinion, is the same as section 2905 R. L. 1915, which reads as follows: "In order to make valid the marriage contract, it shall be necessary that the respective parties be not related to each other nearer than in the fourth degree of consanguinity; that the male at the time of contracting the marriage shall be at least eighteen years of age, and the female at least fifteen years of age; that the man shall not at the time have any lawful wife living and that the woman shall not at the time have any lawful husband living; and it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from the agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated." The Court then proceeded to make use of the following language: "Section 1870 is mandatory as to its provisions except that relating to a license. That provision must be held to be simply directory. By the universal rule of construction applied to statutes regulating marriage, wherever it is possible to



do so, the provisions must be held to be directory and not mandatory. They are held mandatory only when accompanied by provisions of nullity; if it is provided that upon the failure to perform certain steps made essential to the validity of a marriage, such marriage shall be null and void, the provision is held mandatory, but not otherwise. All of the provisions of section 1870, except that in respect to licenses, are framed in language mandatory in nature." And on a motion for a rehearing of the case (16 Haw. 505) the court said: "The court held that the statutory provisions concerning marriage referred to in the defendant's motion were mandatory, except that relating to a license, which it held to be directory. This necessarily meant, and it was after due deliberation intended to mean, that persons could be legally married in contemplation of this article (Sections 1875 C. L., 1289 C. C.) who had not a marriage license. [296] Distinction is made between those things which the statute declares shall be necessary 'in order to make valid the marriage contract,' and the provision that 'it shall in no case be lawful for any person to marry without a license,' between a legal or valid marriage and one which is not in conformity with directory requirements of the statute."

If section 2905 R. L. 1915 could properly have been considered entirely without relation to any other contemporaneous statute we would be inclined to agree, as held in the Godfrey-Rowland opinion, that the provision relating to a license is merely directory because unaccompanied by any



provisions of nullity. But there existed at that time a statute which must have been overlooked by the justices of the supreme court when engaged in formulating that opinion, that is, section 8 of chapter 3 R. L. 1915, which is to be found under the heading "Operation of Laws," and which reads as follows: "Section 8. Prohibitory. Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." Laws upon the same subject are construed with reference to each other and it thus becomes necessary to consider these two statutes *in pari materia*. It is provided in section 2905 that "it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from an agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated." Here we have a law which is clearly prohibitory but which within itself contains no words of nullity. Section 8, however, supplies this deficiency and expressly renders null and void whatever is done in contravention of a prohibitory law. A prohibitory law is defined as "one which forbids all actions which disturb the public repose or injury to private rights, or crimes or misdemeanors, or certain actions in relation to the transmission of estates, the capacity of persons, or their objects" (26 A. & E. Enc. L. 533). Neither in the opinion nor in the entire record in the Godfrey-Rowland case is section 8 mentioned, and we must therefore conclude that had the Court been aware of its ex-

istence the Godfrey-Rowland opinion would not have been rendered. In the very earliest laws enacted in these islands there is plainly expressed a determined effort to protect morality and the social order as well as the rights of property by requiring a marriage license as a prerequisite to the right to marry and providing penal consequences for a violation of that requirement. In section 11, chapter 10, Laws 1842 (see Fundamental Law of Hawaii), it is provided that "Those who desire to be united in wedlock shall first go to the governor or to his agent, and obtain a written assent to their marriage, and then it shall be proper for the priest to solemnize the marriage." And in section 12 it is provided: "If any one disregard \* \* \* the XI section of this law, or if any one shall unite persons in marriage in a manner at variance with any part of this law, he shall be fined one hundred dollars." These enactments clearly demonstrate an early determination on the part of the law-makers in these islands to add vitality to the loose and doubtful marriage system which had grown up under the common law and to make a marriage a homogeneous, staple and certain institution. It is true the statutes of 1842 were merely penal and contained no words of nullity but when at a later date sections 8 and 2905 were enacted this defect was provided for.

Prior to 1844 contracts to marry *per verba de praesenti* were recognized as valid in England but in that year the doctrine was repudiated and down to the present date marriages are valid only if

solemnized according to the marriage act of the realm. Among the United States there is an astonishing lack of uniformity in the laws on this subject. In some of the states common-law marriages are still recognized while in others the reverse is true. The modern tendency, however, is to recognize marriage as something more than a civil contract for it creates [297] a social status or relation between the contracting parties in which not only they but the state as well are interested and involves a personal union of those participating in it of a character unknown to any other human relation and having more to do with the morals and civilization of the people than any other institution. For these reasons there is a gradual tendency to protect the parties as well as society by reasonable requirements unknown to the common law but which at the same time are not burdensome nor calculated to discourage marriage among those who ought to assume that relation.

We are mindful that a former unanimous opinion by the justices of this court should not be lightly overturned but here we are confronted with an occasion where a departure from a former decision which has become a precedent is rendered necessary in order to vindicate plain and obvious principles of law. We are therefore compelled to overrule that part of the Godfrey-Rowland opinion which holds that a marriage in this Territory is valid notwithstanding no license to marry is

first obtained by the parties. This conclusion disposes of the case adversely to the appellant.

But while this opinion is devoted mainly to a discussion and determination of a question which was not available to the trial judge yet it must not be inferred that we disagree with his decision or conclusions. He found as a matter of fact, and was amply sustained by the evidence and we concur therein, that the relations between the appellant and Parke were entirely illicit; that there was no marriage between them, either common law, statutory or otherwise. This necessitated the dismissal of appellant's bill as the relief she sought could avail her nothing.

The decree appealed from is affirmed.

W. B. PITTMAN (ANDREWS & PITTMAN on the brief), for complainant.

A. G. M. ROBERTSON and W. F. FREAR (FREAR, PROSSER, ANDERSON & MARX and ROBERTSON & OLSON on the brief), for respondents.

(Signed) JAMES L. COKE.

(Signed) S. B. KEMP.

(Signed) W. S. EDINGS.

[Endorsed]: No. 1177. Supreme Court, Territory of Hawaii. October Term, 1919. Frances L. Parke vs. Jane S. Parke, Annie H. Parke, Bernice P. Walbridge and Hawaiian Trust Company, Limited, an Hawaiian Corporation, as Administrator of the Estate of William C. Parke, Deceased. Opinion. Filed April 6, 1920, at 9:45 A. M. J. A. Thompson, Clerk. [298]



## CLERK'S CERTIFICATE.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii,

DO HEREBY CERTIFY that the foregoing document and attached hereto, together with the endorsement thereon, is a full, true and correct copy of the original OPINION of the Supreme Court which is now on file in the office of the Clerk of said Supreme Court in the foregoing entitled cause, Numbered 1177.

WITNESS my hand and the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 13th day of December, 1921.

[Seal] (Sgd.) JAMES A. THOMPSON,  
Clerk of the Supreme Court of the Territory of Hawaii. [299]

In the Supreme Court of the Territory of Hawaii.  
October Term, 1904.

FRANK GODFREY, Trustee for THOMAS METCALF,

vs.

HELEN ROWLAND, HING CHUNG, J. F. FRANCIS, KONDO, D. O. HAMMOND, JOSE DO ESPIRITO SANTO, W. O. SMITH, Trustee, and B. J. GALLAGHER.



Exceptions from Circuit Court for the First Circuit.

Submitted October 4, 1904.

Decided January 16, 1905.

FREAR, C. J., HARTWELL and HATCH, JJ.  
MARRIAGE—License—Ceremony.

In order to prove a legal marriage it is not necessary to prove that a license to marry was issued. The license will be presumed from the celebration of the marriage. Nor need any ceremony be shown to prove a marriage.

ID.—License—Directory Only.

The provisions of Sections 1870 and 1871, Civil Laws, requiring a license to marry to be obtained, are directory only, and a failure to comply with the same does not render a marriage void.

ID.—ID.—Record.

It is not necessary to show, in order to prove a marriage, that a record of the issuance of a marriage license was kept by the officer who issued the same.

LEGITIMACY—Adultery of Mother.

Evidence of adultery of the mother cannot be received to prove illegitimacy, if the husband and wife were living together at the time when the child was conceived.

PRESUMPTION OF LEGITIMACY—Proof.

The presumption of legitimacy may be overcome by proof. The proof need not go to the extent of showing the impossibility of legitimacy,

neither need it remove every reasonable doubt; it must, however, be clear, distinct and convincing. A showing of improbability of legitimacy is not sufficient.

## PRESUMPTIONS.

The presumption of innocence may be offset by the presumption that relations between a man and woman, illicit in the beginning, continued so until proof of a change of status [300] should be offered.

## COMMON LAW—Merger—Deed of Life Tenant.

A deed of a life tenant, joined in by a remainderman, will not defeat a contingent estate in this jurisdiction. The common law respecting merger not adopted in Hawaii.

## OPINION OF THE COURT BY HATCH, J.

This is an action of ejectment, coming here on a bill of exceptions from the Circuit Court of the First Circuit. The plaintiff claims as trustee for Thomas Metcalf one undivided half of certain land situated on the northeast corner of Beretania and Alapai streets in Honolulu. This land was the property of Theophilus Metcalf, deceased, who devised it to his son Frank for life, with remainder to Frank's children lawfully begotten, if any, with remainder over in case of failure of issue. The life tenant died in the year 1900. The plaintiff contends that he represents the only lawfully begotten child of Frank Metcalf, to wit, Thomas Metcalf, who was living at the date of the death of his father. The legitimacy of Frank Metcalf was in issue, and also the fact of a marriage between Frank's father

and mother. The jury returned the following verdict:

“We the jury in the above-entitled cause find for the defendants in that the evidence fails to show that a record of the issuance of the marriage license was kept as required by law.

(Sgd.) E. E. MOSSMAN, Foreman.

Honolulu, Oahu, September 30 1903.”

The plaintiff excepted to the verdict and filed a motion for a new trial.

The first exception relied upon by the plaintiff is the exception to the giving of defendants’ requested instruction No. 7, being subdivision A of plaintiff’s exception No. 13. [301]

“(a) In order to find a marriage between Frank and Alice Metcalf, you must find that a license to marry was obtained and a marriage ceremony performed, although the license need not necessarily be produced in court to establish this.”

This instruction does not correctly state the law as to the necessity for a ceremony of marriage. It is also faulty on account of its vagueness in respect to the necessity to prove a license to marry. The law in force in Hawaii at the date of the marriage in question was as follows:

Civil Laws, “Sec. 1869. It shall not be lawful for any minister of religion of any sect whatsoever, or any other person, to perform the marriage ceremony within this Kingdom, without first obtaining from the Minister of the Interior a license to celebrate marriage.”

“Sec. 1870. In order to make valid the marriage contract, it shall be necessary that the respective parties be not to each other within the fourth degree of consanguinity; that the male at the time of contracting the marriage shall be at least seventeen years of age, and the female at least fourteen years of age; that the man shall not at the time have any lawful wife living and that the woman shall not at the time have a lawful husband living; and it shall in no case be lawful for any person to marry in this Kingdom without a license for that purpose duly obtained from the agent duly appointed to grant licenses to marry.”

“Sec. 1871. The marriage rite may be performed and solemnized by any person duly authorized by law, upon presentation to him of a license to marry, as prescribed by the foregoing section; who may be at liberty to receive the price to be stipulated by the parties, or the gratification tendered to him.”

There is nowhere to be found in our law a provision requiring a ceremony. The most that can be said is that the statute implies a ceremony. Sec. 1871 is permissive merely. It has not even the force of a directory enactment. Sec. 1870 is mandatory as to all its provisions except that relating to a license. That provision must be held to be simply directory. By the universal rule of construction applied to statutes regulating marriage, wherever it is possible to do so, the provisions must be held to be directory [302] and not mandatory.



They are held mandatory only when accompanied by provisions of nullity; if it is provided that upon the failure to perform certain steps made essential to the validity of a marriage such marriage shall be null and void, the provision is held mandatory, but not otherwise. All of the provisions of section 1870, except that in respect to licenses, are framed in language mandatory in nature. It becomes clear that these were intended as mandatory when the enactments in regard to annulment of a marriage are considered. By section 1920 of the Civil Laws all of the requirements which we have called mandatory in section 1870 are repeated as grounds for declaring a marriage null and void. The failure to obtain a marriage license, as required by section 1870, however, is not made a ground for declaring a marriage void. There being, then, no provision of nullity connected with this requirement, it must be held to be directory only; and a failure to comply could not be held to be a ground of nullity, nor to affect the validity of a marriage entered into without it.

In *Meister vs. Moore*, 96 U. S. 76, the Court says: "Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence, they are not within the principle, that, where a statute creates a right and provides a remedy for its enforcement the remedy is exclusive. No doubt, a statute may take away a common-law right; but there is always a presumption that the legislature has no such in-



tention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed [303] manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses. Such formal provision may be construed as merely directory instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage."

In *Parton vs. Hervey*, 1 Gray 119, the Court says: "But the effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only, upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But in the absence of any provision, declaring marriages, not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute."

See also *Bishop on Marriage and Divorce*, 283 (6 Ed.). Bishop says: "Marriage existed before

statutes, it is a natural right, it is favored by the law. Hence, in reason, any commands which a statute may give concerning its solemnization, should, if the form of words will permit, be [304] interpreted as mere directions to the officers of the law and to the parties, not rendering void that which is done in disregard thereof."

In *Republic vs. Waipa*, 10 Haw. 442, it was held that it was not necessary to prove that a license to marry had been obtained in order to support a conviction for adultery. The Court says: "On the point that the prosecution must prove that a license to marry must be proven, we hold that this is not necessary. 'When the law casts upon an official person a duty connected with his office, and the time for its performance transpires, the *prima facie* presumption is that it is done.' 1 Bishop on Marriage and Divorce, Sec. 450. The presumption holds good until the contrary is shown. It was therefore not necessary to produce the license to marry nor to prove that the agent who granted it had the requisite authority." The reason for supporting this presumption is a case where the issue is one of inheritance is much stronger than in a case of criminal prosecution for adultery.

In *Cartwright vs. McGowan*, 121 Ill. 388, the Court lays down this rule: "When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, in fact everything necessary to the validity of the marriage in the absence of proof to the contrary, will be presumed.

The instruction therefore was clearly wrong as to the statement that a ceremony must be proved. It is also wrong in that it allowed the jury to believe that under any circumstances it would be necessary for the plaintiff to offer evidence as to the issuance of a license in presenting his own case. The prejudice resulting to the plaintiff from giving this instruction becomes more apparent with the next [305] two instructions asked by the defendant are considered. These are defendants' requests No. 8 and No. 9. They are as follows:

"8. Under the law as it existed at the time of the alleged marriage of Frank and Alice Metcalf, it was the duty of agents to grant marriage licenses, at the close of each year to transmit a copy of all the licenses granted by them during the year to the board of education, and it then became the duty of such board to preserve the record of such licenses. (Compiled Laws, p. 213.)"

"And I instruct you that where a legal duty is imposed upon an officer or board the presumption arises that such officer or board performs its duty, although this presumption may be overcome by evidence."

"9. Under the law as it existed at the date of said alleged marriage and as it now exists, it was and is the duty of every person authorized to solemnize marriages in this Territory to make and preserve a record of every marriage by him solemnized."

“And I instruct you that where a legal duty is imposed upon a minister the presumption arises that such minister performs his duty, although this presumption may be overcome by evidence.”

These instructions introduce into the case matters with which the jury had nothing to do, the consideration of which must have diverted their minds from the real issue. The question for the jury to decide was, did a marriage take place between Frank and Alice Metcalf as claimed by plaintiff. The tendency of the instruction was to produce an impression that in order to prove a valid marriage, the plaintiff must have proved that a license had been issued, that such license was recorded, and that such record was transmitted to the board of education. Legitimacy cannot be made to depend upon the proof or want of proof of the performance by any official of a merely clerical duty. Defendants' counsel protest that these instructions were not intended to convey such an idea. It seems to us however clear that this conclusion [306] might have been drawn from them by the jury. The qualification added by the trial Judge did not relieve the instructions of their objectionable features—they should not have been given at all. On the other hand, the presumption that a license was issued may be rebutted by proof to the contrary. And evidence that no license was in fact issued, though not of itself sufficient to disprove marriage, may be considered, with other circumstances as tending to prove that a marriage had not taken place, as claimed.



In consequence of errors in defendants' requests for instructions numbered 7, 8 and 9, the verdict should be set aside and a new trial ordered.

We deem it advisable to express our views upon some of the other questions of law upon which rulings were asked. Counsel for defendants requested the following instructions bearing upon the question of the legitimacy of Thomas Metcalf:

"Defendants' instruction numbered 13.

"Although there is a presumption that a child born in lawful wedlock is legitimate, yet if it is not shown that sexual intercourse actually took place between the husband and wife at a time that the husband might have been the father of the child many circumstances may be relevant to rebut the presumption of legitimacy.

"Defendants' instruction numbered 14 as modified.

"Among these circumstances are the relative situation of the parties and their habits in life, and reputation in the family, the adultery of the mother, and other facts bearing on the probabilities of the case. However, the law presumes that the husband and wife do have sexual intercourse until the contrary is shown by competent evidence to the satisfaction of the jury that the husband did not have such access to the mother." [307]

"Defendants' instruction numbered 15.

"It is not necessary for the defendant to go so far as to show that there was no possibility



of access between Frank and Alice at or near the time of the child's conception in order to make competent proof of the child's illegitimacy."

"Defendants' instruction numbered 16.

"If you find from the evidence that at or near the time of Thomas' conception, if conceived in 1882, his mother was having or had adulterous intercourse with another man, and if you also find that it is improbable that Frank had access to her at such times, I instruct you that these are circumstances to be weighed by you in arriving at a conclusion as to whether Thomas is legitimate or illegitimate."

The above instruction numbered thirteen does not give sufficient weight to the presumption of legitimacy and seems to imply that a person claiming legitimacy must show something more than birth in lawful wedlock. This is not the case, the burden is entirely upon the party contesting the legitimacy to prove to the satisfaction of the jury the fact of the illegitimacy and to overcome the presumption of legitimacy. This, however, can be done by circumstantial evidence.

In *Hawes vs. Draeger*, L. R. 23 Ch. Div. 178, the Court says: "That the presumption of legitimacy may be rebutted by circumstances inducing a contrary presumption; and that nonaccess, or non-generating access, may be proved by means of such legal evidence as is admissible in every other case in which a legal fact has to be proved."

Instructions numbered fourteen and sixteen improperly admit a consideration of probabilities. The presumption of legitimacy cannot be destroyed by a mere probability. The proof must be clear, distinct and convincing. It need not go to the extent of showing the absolute impossibility of legitimacy in order to be strong enough to overcome the presumption. A showing merely that it was improbable that the husband was the father [308] of the child is not sufficient. No child born in lawful wedlock can be decreed a bastard on any showing of circumstances which only creates doubt and suspicion. *Shuman vs. Shuman*, 83 Wis. 254. A balance of probabilities is not enough. *Morris vs. Davis*, 5 Clark & Finley, 265; *Stegall vs. Stegall*, 22 Fed. Cases, 1230; *Phillips vs. Allen*, 2 Allen, 453; *Caijole vs. Ferrie*, 23 N. Y. 109; *Orthewein vs. Thomas*, 127 Ill. 562.

These instructions also improperly allow a consideration of the alleged adultery of the mother.

If the facts show that the husband and wife were living together, evidence as to the adultery of the wife is absolutely inadmissible. The issue is, as to this phase of the case, whether or not the husband had sexual intercourse with the wife. The adultery of the wife has no bearing on this question, and it certainly cannot be used as evidence tending to show that the husband did not in fact have intercourse with the wife.

In *Hopkins vs. Chung Wa*, 4 Haw. 650, this Court went to the extent of holding that even evidence of the child's admixture of blood is inadmis-

sible to rebut the presumption of legitimacy, and that the adultery of the wife could not be shown, the husband and wife having lived together during a year or more previous to the birth of the child.

“It is established law that every child born in wedlock, when the husband is not shown to be impotent, is presumed to be legitimate, even though the parties are living apart by mutual consent; that this presumption—(as held in modern times) may be rebutted by proof that the husband had no access to his wife during the time when, according to course of nature, he could be the father of the child; but that the presumption cannot be rebutted by proof of the wife’s adultery while cohabiting with her husband—the law not allowing the admission of evidence on the question, whether the adulterer or the husband is most likely to be the father of the child.” *Hemmenway vs. Towner*, 1 Allen, 209. [309]

Defendants’ instruction numbered fifteen is correct. It is not necessary for the defendant to go so far as to show that there was no possibility of access between Frank and Alice at or near the time of the child’s conception in order to make competent proof of the child’s illegitimacy.

It was once held that the presumption of legitimacy, if the husband by possibility could have had access to the wife, could not be disproved; the early rule being that if the husband was “within the four seas” the child was legitimate and the contrary could not be shown. Later, it was held that

if the fact of marriage has been proved, nothing can impugn the legitimacy of the issue short of proof of facts showing it to be impossible that the husband could be the father. *Patterson vs. Gaines*, 6 How. 550. The point actually decided in *Patterson vs. Gaines*, however, was that a child could not be bastardized by the mere declarations of the father. In *Phillips vs. Allen*, 2 Allen, 453, it was held that the presumption of legitimacy can only be rebutted by evidence which proves beyond all reasonable doubt that the husband could not have been the father. These cases show a survival of a trace of the old *quatuor maria* idea. We understand the modern rule to be that proof of nonaccess need not go to the extent of showing the impossibility of the husband being the father; neither is it necessary that the proof should be clear beyond every reasonable doubt. If it is once held that the presumption may be rebutted at all, there seems to be no logical reason why the fact of illegitimacy should be required to be proved in any other manner than is any other fact in a court of justice. This seems to have been the view of the House of Lords in *Morris vs. Davies*. On page 244, Lord Cottenham said, "the argument for the appellant assumes as a rule of law, that no evidence is admissible to disprove sexual intercourse having [310] taken place, where the opportunity is proved to have existed, the husband and wife having been proved to have been within the same house. This is very like attempting to establish a doctrine of *intra quatuor muros*, instead of the exploded doc-



trine of *quatuor maria*. But it is admitted that the parties may be followed within these four walls, and the fact of sexual intercourse not only disapproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact. If so the principle does not stand on any positive rule of law, *but upon evidence of the fact as to which the ordinary rules of evidence must be applied.*" And again on page 260 it is said the presumption stands until encountered by such evidence as proved *to the satisfaction of those who are to decide the question* that sexual intercourse did not take place. And on page 261 "that it is the duty of a jury and your Lordships to weigh the evidence against presumption and to decide according as, in the exercise of free and honest judgment, either may appear to preponderate."

Defendants' request number 11 was as follows:

"If you find from the evidence that Frank and Alice were illicitly cohabiting together before the alleged marriage, I charge you that the presumption arising therefrom is that they continued to cohabit illicitly, and unless you find that such presumption has been overcome by evidence of their marriage, you must find for the defendant."

This instruction is correct. The plaintiff contends that the presumption of continuing illicit relations was overcome by the presumption of innocence, and that the presumption of marriage arising from cohabitation is one of the strongest known to the law, especially in cases involving legitimacy.



The first presumption is one easily overcome by evidence of marriage. The second presumption is a presumption which increases in force with the length of time during which the parties live together as husband and wife. [311]

“The presumption of legitimacy is a constant presumption, and is to have weight and influence throughout the investigation, the weight of the presumption increasing with lapse of time.” *Shuman vs. Shuman*, 83 Wis. 254; *Ingersoll vs. McWillie*, 30 S. W. 61.

In the present case Frank and Alice Metcalf lived together as man and wife after the alleged marriage for only three years. This weakens materially the force of the presumption of innocence. Under all the circumstances of the case it appears to us that the presumptions offset each other, which would leave it to the plaintiff to prove affirmatively the marriage upon which he relies, uninfluenced by any presumption one way or the other.

The Trial Judge erred in excluding the evidence of the issuance of a marriage license offered by the plaintiff in rebuttal. The testimony, though not contradicting any one expression of any of the witnesses produced by the defendant, rebuts the whole theory of the defense and should have been received.

It is urged that notwithstanding any errors appearing in the record the verdict should not be disturbed for the reason that the deed offered in evidence by the defendants (Defendants' Exhibit 1) from Frank Metcalf to Julia Prosser, Helen

Rowland and W. G. Rowland, trustee, dated March 9th, 1875, operated to destroy the contingent estate of any children of Frank Metcalf and that defendant Helen Rowland must have judgment in any event. Frank Metcalf, by the third paragraph of the will of his father Theophilus Metcalf, took a life estate in the land in question, with remainder to his children lawfully begotten should he leave any; otherwise the property was devised to the testator's daughters Helen and Julia should they survive Frank or the survivor of his said daughters. The fourth paragraph of the will [312] shows that life estates only were intended to the daughters, a gift over to their children being made, in case they left any lawfully begotten, and a disposition being made in case of the decease of one of the daughters without children. The contention is that in consequence of the adoption of the common law by the act of 1892 the common-law doctrine of merger applies, and the contingent remainder in Frank Metcalf's children was squeezed out and destroyed by the deed of Frank above stated. The common law, except as to certain doctrines specially adopted, was not in force in Hawaii in 1875, the time when the deed in question was made. Nor did its subsequent adoption affect Hawaiian conveyancing. The adoption of the common law was not unqualified. It was excluded when in conflict with the laws, judicial precedents, or usage of Hawaii. Long before the adoption of the common law a system of conveyancing had grown up in Hawaii by national usage

and had become fixed in character. Feoffments and livery of seisin were unknown, as were all of the incidents of the feudal system. The Hawaiian deed was analogous to a bargain and sale deed, and was dependent for its force and effect, until the statute of uses was recognized, upon Hawaiian usage. The statute of uses, however, became law at an early date in Hawaii. As pointed out in *Haw. Trust Co. vs. Barton*, decided at the present term, the statute of uses must be held to have been in effect here since 1855. But at common law a merger would not result from a deed of bargain and sale. The distinguishing feature of a common-law deed of bargain and sale was that it passed no greater title than the grantor had to convey. In *Dennett vs. Dennett*, 40 N. H. 565, the Court says: "But it is settled that conveyances which derive their operation from the statute of uses, as a bargain and sale, lease and release, and the like do not bar [313] contingent remainders, for none of them pass any greater estate than the grantor may lawfully convey." No greater effect can be given to a conveyance here. The deed of Frank Metcalf operated upon his life estate only, and did not affect the contingent remainder in any child which he might lawfully have begotten.

It is finally contended that there was not sufficient proof of possession by any of the defendants to support a verdict against them. This was made one of the grounds of a motion by defendants for a direct verdict. The motion was overruled and an exception taken by defendants. There was evi-

dence of possession by the defendant Helen Rowland, but none as to the other defendants. As to the latter the verdict should stand. As to the defendant Helen Rowland and the extent of her possession was not made an issue in the case, nor was there any disclaimer by her as to any portion of the land claimed. The jury might have found her possession coextensive with the title claimed by her. The indefiniteness of the testimony as to the extent of her possession was not such a fundamental defect in the plaintiff's case as to control any subsequent finding. It is not in its nature conclusive, and should not in our opinion deprive the plaintiff of his right to a reversal of the verdict in consequence of the errors committed on the trial. As to the defendant Helen Rowland the verdict is set aside and a new trial ordered. The case is remanded to the Circuit Court for the First Circuit for further proceedings.

ROBERTSON & WILDER, F. E. THOMPSON  
and C. F. CLEMONS, for Plaintiff.

KINNEY, McCLANAHAN & COOPER, for Defendants.

(Signed) W. F. FREAR.

(Signed) ALFRED S. HARTWELL.

(Signed) F. M. HATCH. [314]

[Endorsed on back:] Supreme Court, Territory of Hawaii. L. 5114—C. M. Frank Godfrey, Trustee, vs. Helen Rowland et al. Decision. Filed Jan. 16, 1905. (Signed) George Lucas, Clerk. [315]



## CLERK'S CERTIFICATE.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, and *Ex-officio* Clerk of the Circuit Court of the First Judicial Circuit,

DO HEREBY CERTIFY that the foregoing document and attached hereto, together with the endorsement thereon, is a full, true and correct copy of the original DECISION of the Supreme Court which is now on file in the office of the Clerk of said Circuit Court in the foregoing entitled cause, Law Division Numbered 5114. (Reported in 16 Hawaii, pages 377-390.)

WITNESS my hand and the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 13th day of December, 1921.

[Seal] (Sgd.) JAMES A. THOMPSON,  
Clerk of the Supreme Court of the Territory of  
Hawaii. [316]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

At Chambers—In Divorce.

LIBEL FOR DIVORCE.

FUNG DIA KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.



MOTION FOR SUPPLEMENTAL LIBEL.

Now comes Fung Dai Kim Ah Leong, libellant herein, by her attorneys, Thompson, Cathcart & Ulrich, and moves this Honorable Court for an order permitting libellant to file and serve the annexed supplemental libel for divorce.

This motion is based upon the affidavit of F. E. Thompson, hereto attached and made a part hereof, and upon the libel for divorce heretofore filed and served herein.

Dated at Honolulu, T. H., this 8th day of December, A. D. 1921.

FUNG DAI KIM AH LEONG,  
Libellant.

By THOMPSON, CATHCART & ULRICH,  
F. E. T.,  
Her Attorneys. [317]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

At Chambers—In Divorce.

LIBEL FOR DIVORCE.

FUNG DAI KIM AH LEONG,  
Libellant,  
vs.  
L. AH LEONG,  
Libellee.

## AFFIDAVIT OF F. E. THOMPSON.

Territory of Hawaii,

City and County of Honolulu,—ss.

F. E. Thompson, being first duly sworn, on oath deposes and says:

That he is one of the members of the firm of Thompson, Cathcart & Ulrich, the attorneys for Fung Dai Kim Ah Leong, libellant above named.

That since the filing of the original complaint in divorce herein, Ho She, otherwise known and called Ah Keau, has, upon the solicitation and at the expense of said libellee, arrived at the Port of Honolulu, where she seeks to enter as the wife of L. Ah Leong; that in furtherance of her application to enter as the wife of L. Ah Leong, the said libellee has repeatedly appeared before the immigration authorities, representing that the said Ah Keau is his lawful wife and as such is entitled to admission to the Port of Honolulu; and that since the arrival of said Ah Keau, said libellee has stated to diverse and sundry persons that she is his lawful wife and that libellant is not now and never has been his lawful wife.

F. E. THOMPSON.

Subscribed and sworn to before me this 8th day of December, 1921.

[Seal]

DOROTHY O. DAVIDS,  
Notary Public, First Judicial Circuit, Territory  
of Hawaii. [318]

In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii.

At Chambers—In Divorce.

LIBEL FOR DIVORCE.

FUNG DAI KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.

ORDER FOR SUPPLEMENTAL LIBEL.

On reading and filing the foregoing motion and affidavit of F. E. Thompson, in support thereof, and the supplemental libel for divorce attached thereto, and good cause thereto having been shown,

IT IS HEREBY ORDERED that the motion of the said Fung Dai Kim Ah Leong, libellant above named, for permission to file and serve the attached supplemental libel for divorce, be and the same is hereby granted.

Done at Chambers, this 9th day of December, 1921.

[Seal]

(Sgd.) J. T. DEBOLT,

Second Judge Circuit Court, First Judicial Circuit, Territory of Hawaii. [319]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

At Chambers—In Divorce.

No. 8196.

LIBEL FOR DIVORCE.

FUNG DAI KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.

SUPPLEMENTAL LIBEL FOR DIVORCE.

Now comes Fung Dai Kim Ah Leong, of the City and County of Honolulu, Territory of Hawaii, libellant above named, and further complaining of L. Ah Leong, of the same place, in an action of divorce, alleges:

That since the filing of the original complaint in divorce herein, Ho Shee, otherwise known and called Ah Keau, has, upon the solicitation and at the expense of said libellee, arrived at the Port of Honolulu, where she seeks to enter as the wife of L. Ah Leong; that in furtherance of her application to enter as the wife of L. Ah Leong, the said libellee has repeatedly appeared before the Immigration authorities representing that the said Ah Keau is his lawful wife and as such is entitled to admission to the Port of Honolulu; and that since the arrival of said Ah Keau, said libellee has stated to diverse and sundry persons that she is his law-

ful wife and that libellant is not now and never has been his lawful wife.

Dated at Honolulu, T. H., December 8th, 1921.

Her

FUND DAI X KIM AH LEONG,  
Mark

Libellant.

THOMPSON, CATHCART & ULRICH,  
F. E. T.,

Attorneys for Libellant. [320]

Territory of Hawaii,  
City and County of Honolulu,—ss.

Fung Dai Kim Ah Leong, being first duly sworn, on oath deposes and says: That she is the libellant named in the foregoing action; that she has had the foregoing supplemental libel for divorce translated to her, from English to the Chinese language; that she knows the contents thereof, and that the same is true.

Her

FUNG DAI X KIM AH LEONG.  
Mark

Subscribed and sworn to before me this 8th day of December, 1921.

[Seal] (Sgd.) DOROTHY O. DAVIDS,  
Notary Public, First Judicial Circuit, Territory  
of Hawaii. [321]



In the Circuit Court of the First Circuit, Territory  
of Hawaii.

At Chambers.

FUNG DAI KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.

### DIVORCE SUMMONS.

The Territory of Hawaii:

To the High Sheriff of the Territory of Hawaii, or  
His Deputy; the Sheriff of the City and  
County of Honolulu, or His Deputy:

You are commanded to summon L. Ah Leong to  
appear thirty days after service hereof, before  
such Judge of the Circuit Court of the First Cir-  
cuit as shall be sitting at Chambers, in his court-  
room in the Judiciary Building in Honolulu, to  
answer the annexed Supplemental Libel in Di-  
vorce.

And have you then there this writ with full re-  
turn of your proceedings thereon.

WITNESS the Honorable Presiding Judge at  
Chambers and seal of the Circuit Court of the  
First Circuit, at Honolulu aforesaid, this 9th day  
of December, 1921.

[Seal]

(Sig.) SIBYL DAVIS,  
Clerk.

### SHERIFF'S RETURN.

Served the within summons, motion, affidavit and order on L. Ah Leong, this 9th day of December, 1921, by delivering to him a certified copy hereof and of the petition or libel annexed hereto and at the same time showing him the original, at Honolulu, T. H.

Dated December 9th, 1921.

(Sgd.) TOM PUNEE,  
Police Officer. [322]

[Letter-head of Thompson, Cathcart & Ulrich.]  
December 14, 1921.

Richard L. Halsey, Inspector-in-Charge,  
United States Immigration Service,  
Honolulu, T. H.

Dear Sir:

We beg to enclose, all in triplicate, the following:

1. Certified copy of libel for divorce, Fung Dai Kim Ah Leong vs. L. Ah Leong;
2. Certified copy of motion for leave to file supplemental libel in the matter described in No. 1;
3. Certified copies of deeds and affidavit of Fung Dai Kim Ah Leong in regard to the same;
4. Affidavit of F. E. Thompson in regard to proposed form of conveyances by L. Ah Leong and Fung Dai Kim, described in said conveyance as "wife of the said L. Ah Leong";
5. Certified copy of indictment and proceedings thereunder in United States District Court

against L. Ah Leong charged with unlawful cohabitation with Ho Shee, otherwise known as and called Ah Keau, the applicant for landing at the Port of Honolulu;

6. Certified copy of indictment in the United States District Court and proceedings thereunder against L. Ah Leong, for bigamy;
7. Certified copy of the decision of the Supreme Court of the Territory of Hawaii in the case of Frank Godfrey, etc., vs. Helen Rowland, et al., holding that to prove a legal marriage it is not necessary to prove that license to marry was issued; the license will be presumed from the celebration of the marriage;  
and
8. Certified copy of decision of the Supreme Court in Frances L. Parke vs Jane S. Parke, et al., and overruling "that part of the Godfrey-Rowland opinion which holds that a marriage in this Territory is valid notwithstanding no license to marry is first obtained by the parties," but leaving the law of the Godfrey-Rowland case as to the affirmative presumption that a license to marry was issued, unchanged.

Very truly yours,

By THOMPSON, CATHCART & ULRICH.

F. E. T. [323]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

At Chambers—In Divorce.

No. —.

LIBEL FOR DIVORCE.

FUNG DAI KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.

COMPLAINT.

Now comes Fung Dai Kim Ah Leong, of the City and County of Honolulu, Territory of Hawaii, libellant above named, and complains of L. Ah Leong, of the same place, in an action of divorce, and says:

I.

That the libellant and libellee are now and for more than thirty-eight (38) years last past have been husband and wife; that during all of said 38 years they have been residents of the now Territory of Hawaii; that they now reside in the City and County of Honolulu, Territory of Hawaii; and that they last lived together as husband and wife in said City and County of Honolulu.

II.

That they are living separate and apart.

III.

That there have been issue of said marriage

fourteen (14) children; that all said children have passed the age of minority, excepting Murtle, a daughter, aged seventeen (17) years, and Mew Len, a daughter, aged sixteen (16) years. [324]

#### IV.

That for a period of twenty-nine (29) years and over, the said libellee has lived in open and notorious adultery with numerous women, including one Ah Keau, otherwise known as and called Ho Shee. That, as a result of this, his adulterous relations with said Ah Keau, otherwise known as Ho Shee, five (5) children were born to the said Ho Shee. That during the said period last mentioned he also lived in open notorious adultery with one Zane Shee, and as a result of said adulterous relations, three (3) daughters were born to the said Zane Shee. That during the said period he lived in open notorious adultery with one Chung Shee. And that during said period he lived in open and notorious adultery with one Wong Shee, and that, as a result of said adulterous relations, a son was born to the said Wong Shee.

#### V.

That on the 12th day of April, 1907, the Grand Jury empanelled and sworn in the United States District Court for the Territory of Hawaii, found a true bill against the libellee in that within the jurisdiction of said court he did unlawfully cohabit with more than one woman, to wit, with a certain woman named Ho Shee, with a certain woman named Dai Kim (being Fung Dai Kim Ah Leong, libellant herein), and with a certain woman named



Fung Shee (being the Chung Shee heretofore mentioned herein).

That thereafter, to wit, on the 17th day of April aforesaid, said libellee plead guilty to said charge contained in said bill, and thereafter, to wit: on the 17th day of April aforesaid, was sentenced to pay a fine of Three Hundred Dollars, which said sentence said libellee thereupon did duly perform.

#### VI.

That on or about the 1st day of March, A. D. 1910, in the District Court of the United States, for the Territory of Hawaii, an indictment, charging the said libellee with bigamy [325] in that he did unlawfully and feloniously marry and take as his wife one Ho Shee, otherwise called Ah Keau, the person hereinabove referred to, the said libellee being then and there married to libellant, was found against said libellee; that thereafter, to wit: on the 2d day of April, 1910, upon a plea of *nolo contendere* having been theretofore entered, the said libellee was found guilty of bigamy as aforesaid, and was sentenced to imprisonment for one hour and to pay a fine of \$500.00, all of which sentence said libellee thereafter performed.

#### VII.

That for more than twenty-nine (29) years last passed the said libellee has treated the libellant with extreme cruelty in this that he has forced her to associate and consort with the women aforesaid by whom he has had nine (9) illegitimate children as aforesaid; that he has forced libellant to occupy a position of servility to each of said women

as she ascended in his affection; forced libellant to cook their meals, make and mend their clothes, and attend to the illegitimate children born thereof; that he has professed to libellant a preference for each of said women over libellant and has exhibited to the illegitimate children of said women greater affection than toward his lawfully begotten children.

### VIII.

Libellant further alleges that in July, 1921, libellee suggested that she, said libellant, pay a visit to China, and that in accordance with said suggestion, libellant repaired to the office of the Inspector of the Port of Honolulu for the purpose of having a pre-investigation of her status under the Chinese Exclusion Act, in order that she might return to Hawaii without difficulty; that she requested libellee to give testimony to the Collector of said Port to the effect that she was the wife of a merchant and therefore entitled to travel; that said libellee refused to give such [326] testimony; that well knowing such statement to be false, and for the purpose of causing libellant mental suffering and pain, libellee stated that your libellant was not the wife and had never been the wife of libellee, that he recognized no wife other than Ho Shee, otherwise known and called Ah Keau, hereinabove referred to, and further stated that he was about to bring said Ho Shee, otherwise known and called Ah Keau, into the United States as his wife.

That thereupon libellant informed libellee that she would refuse to live and cohabit with him until he rescinded his said false and malicious statement,

and that ever since said last mentioned date libellant has refused to live and cohabit with the said libelee; that said libelee since last mentioned date, has falsely and maliciously and for the purpose of inhumanly and cruelly subjecting libellant to mental suffering and pain, repeated to libellant and to diverse other persons his statement that libellant is not and never has been his wife.

IX.

Libellant further states that on or about the 5th day of October, 1921, at Honolulu aforesaid, said libelee, in the presence of numerous persons, called libellant violent and opprobrious names, including the term "Song Lee Ma," a Chinese expression which he intended to mean and which in colloquial Chinese is understood to mean, a married woman who cohabits with younger men than her husband; that he then and there told libellant to get out of the house or he would kill her, raised his hand to assault her, and was only restrained by the interference of a lady friend of libellant's; that he thereupon turned upon libellant's lady friend, called her a whore, and said that she, like his wife, was looking for outside intercourse.

X.

That because of the extreme cruel treatment as aforesaid libellant has become nervous and distraught, and believes that her life is in danger from said libelee. [327]

XI.

Libellant further alleges that the libelee has property and effects of the reasonable worth and

value of \$750,000.00, in excess of his liabilities; that all of said property has been acquired by the said libelee through the joint efforts of libellant and libelee; that at the time of their marriage, as aforesaid, libellant and libelee were residents of Kohala, Island of Hawaii, where libelee was engaged in the occupation of storekeeper, in partnership with one Liu Kon Yen; that said partnership on or about the time of the marriage of libellant and libelee was dissolved by virtue of the bankruptcy of the business and of libellee; that thereupon libellant and libelee moved to Honolulu, where libelee was engaged as a Clerk in the store of one L. Ahlo; that during the time said libellant was engaged as a Clerk in said store, libellant was engaged as a cook in the family of said L. Ahlo; that libellant and libellee continued in their respective capacities with said L. Ahlo for a period of about ten (10) months, during which time, through their joint efforts, they had saved the sum of Eighty Dollars (\$80.00) with which sum together with Two Hundred Dollars (\$200.00), which libellant had saved out of the marriage contributions given to her according to the Chinese custom on the date of her marriage, libellant and libellee opened a grocery and general merchandise store in that portion of Honolulu now known as Kakaako, and that the funds so earned by libellant and libellee as aforesaid, and contributed by libellant as aforesaid, were and are the nucleus from which the present fortune of said libellee has accumulated; that said store conducted in Kakaako as aforesaid, was conducted under the



name of Wing Fung Kee, the word "Fung" being libellant's family name, and the words "Wing" and "Kee" being Chinese words of description, commonly called in the Chinese vernacular, "store names"; [328]

That thereafter, and over a successive period of years, and up to and within ten (10) years from the date hereof, the business of libellant and libellee continued to progress; that additional stores were purchased out of the moneys jointly earned by libellant and libellee; that libellant stood watch for watch with libellee in said stores, sold and delivered groceries and merchandise, and in addition to doing all the house work and taking care of their children, libellant, first working by hand, and thereafter by sewing machine, made blouses, jumpers, overalls, petticoats, underwear, mumus and holokus for sale in said store; that libellant over a long period of years and during the incipency of their business, delivered to customers of their stores, goods and wares there purchased; that as the deliveries became heavier, libellant used a wheelbarrow and subsequently a two-wheeled go-cart for the purpose of transporting merchandise purchased from the store.

That on or about the year 1892, under the pretext of having her work as a servant in the house and store, libellee brought into the home of libellant and libellee one Ho Shee, otherwise known and called Ah Keau; that immediately upon having installed her in the house as a servant, it came to the attention and knowledge of libellant that libellee



and Ho Shee were unlawfully having sexual intercourse each with the other; that libellant protested and demanded that she be removed from the house, and upon libellant's refusal so to do, libellant took with her her minor children and left their said home, and that thereafter, as each of the persons hereinabove referred to as having successively had unlawful sexual intercourse with libellee were brought into the house and home of libellant and libellee, libellant protested against the conduct of libellee, whereupon the libellee would state that if she [329] didn't like the conditions, she could leave the house; and libellant further alleges that on four different occasions she has left the house because of such conduct and has returned thereto only upon the earnest solicitation of libellee and the promise that he would reform.

That said libellee is a general merchant with a store situate in Honolulu aforesaid; that part of his property consists of stocks and bonds and other negotiable instruments transferable by delivery; that said libellee threatens to give the illegitimate offspring of the women hereinabove mentioned all of his property in so far as he can do so; that to that end and purpose he had prepared Articles of Incorporation incorporating all of his business under the laws of the Territory of Hawaii; that he first begged, then cajoled, and afterwards threatened libellant regarding the signing of a conveyance conveying all of the real property into said corporation; that upon libellant's refusal so

to do, he entirely cut off his support of her and told her to get out of the house.

XII.

Libellant further alleges that, unless protected by a Decree awarding to her alimony in gross, that the said libellee will dispose of his property and leave for China for the purpose of avoiding the payment of any monthly stipend awarded by this Court.

WHEREFORE, libellant prays that she be granted an absolute divorce from said libellee; that she be awarded the custody of said two minor children; that the Court do award her alimony in gross in such amount as may seem meet and just, together with a just and reasonable sum for the education and maintenance of said minors; that she be awarded costs, expenses and attorneys [330] fees in this behalf.

Dated at Honolulu, T. H., December 5, 1921.

her

FUNG DAI X KIM AH LEONG,

mark

Libellant.

THOMPSON, CATHCART & ULRICH,

F. E. T.,

Attorneys for Libellant.

Territory of Hawaii,

City and County of Honolulu,—ss.

Fung Dai Kim Ah Leong, being first duly sworn, on oath deposes and says: That she is the libellant named in the foregoing action; that she has had the foregoing complaint translated to her, from English to the Chinese language; that she

knows the contents thereof, and that the same is true.

her

FUNG DAI, X KIM AH LEONG.

mark

Subscribed and sworn to before me this 6th day of December, 1921.

[Seal]

DOROTHY O. DAVIDS,

Notary Public, First Judicial Circuit, Territory of Hawaii.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

(Sgd.) B. N. KAHALEPUNA,

Clerk, Circuit Court, First Circuit, Territory of Hawaii.

(Endorsed on back:) Filed at 11 o'clock A. M. Dec. 7, 1921. (S.) B. N. Kahalepuna. [331]

In the Circuit Court of the First Circuit, Territory of Hawaii.

At Chambers.

FUNG DAI KIM AH LEONG,

Libellant,

vs.

L. AH LEONG,

Libellee.

## DIVORCE SUMMONS.

The Territory of Hawaii:

To the High Sheriff of the Territory of Hawaii, or  
His Deputy; the Sheriff of the City and County  
of Honolulu, or His Deputy:

You are commanded to summon L. Ah Leong to  
appear thirty days after service hereof, be-  
fore such Judge of the Circuit Court of the First  
Circuit as shall be sitting at Chambers, in his Court  
Room in the Judiciary Building in Honolulu, to  
answer the annexed Libel in Divorce.

And have you then there this writ with full re-  
turn of your proceedings thereon.

WITNESS the Honorable Presiding Judge at  
Chambers and seal of the Circuit Court of the First  
Circuit, at Honolulu, aforesaid, this 7th day of  
December, 1921.

[Seal]

B. N. KAHALEPUNA,  
Clerk.

## SHERIFF'S RETURN.

Served the within summons on L. Ah Leong this  
7th day of December, 1921, by delivering to him a  
certified copy hereof and of the petition or libel  
annexed hereto and at the same time showing the  
original, at Honolulu, City & County of Honolulu,  
T. H.

Dated December 7th, 1921.

DAN MAKAEANA,  
Police Officer.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

B. N. KAHALEPUNA,  
Clerk, Circuit Court First Circuit, Territory of  
Hawaii..

[Endorsed on back:] D. No. 8196. Reg. 11, p. 166. Circuit Court, First Circuit. Fung Dai Kim Ah Leong, Libellant, vs. L. Ah Leong, Libellee, Divorce Summons. Issued at 11 o'clock A. M., Dec. 7, 1921. B. N. Kahalepuna, Clerk. Returned at 2:50 o'clock P. M. December 7, 1921. Clerk.

Received, Sheriff's Office, Dec. 6, 12:00 A. M., 1921, Honolulu.

JOE S. NOBRIGA,  
Clerk. [332]

Territory of Hawaii,  
City and County of Honolulu,—ss.

Fung Dai Kim Ah Leong, being first duly sworn, deposes and says:

That she is the wife of L. Ah Leong, the Grantor named in each of the deeds hereto attached; that her family name is "Fung"; that the word, "Shee" in Chinese, when used in connection with a surname is indicative of the feminine gender; that according to the Chinese custom and practice, after marriage, the female spouse retains her family name;

Your affiant further says that she is the Fung Shee mentioned and described in each of the afore-said attached instruments, and that the mark on the



original of each of said instruments is her mark; that in each instance she signed the deeds referred to at the request of L. Ah Leong, her husband.

her

FUNG DAI KIM X AH LEONG.

mark

Subscribed and sworn to before me this 13th day of December, 1921.

[Seal]

DOROTHY O. DAVIDS,

Notary Public, First Judicial Circuit, Territory of Hawaii. [333]

U. S. Rev. S. \$2.50.

#### WARRANTY DEED.

KNOW ALL MEN BY THESE PRESENTS, that I, L. Ah Leong, of Honolulu, City and County of Honolulu, Territory of Hawaii; hereinafter called the Grantor, for and in consideration of the sum of Two Thousand One Hundred (\$2,100.00) Dollars, to me in hand paid by Lee Let, of Honolulu aforesaid, hereinafter called the Grantee, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred and conveyed, and by these presents do grant, bargain, sell, transfer and convey unto the said Grantee, his heirs and assigns forever, all of the following described pieces or parcels of land, to wit: all of the said Grantor's undivided one-half interest in and to those certain pieces or parcels of land situate at Kamakela, Honolulu aforesaid, the same being a part of the land described in Apena 1, of L. C. A. 6245, R. P. 1985 and known as Lots 2, 3, 7, 10 and 11, on a

map made for Lee Let by M. D. Monsarrat, dated September 29, 1899, and being a portion of the premises conveyed to Lee Let and Yim Quon by deed of G. W. Kualaku dated December 24, 1898, and recorded in the Registry of Conveyances in Honolulu aforesaid in Liber 188, on page 228; the premises herein described being the same premises now occupied by the said Grantee and in which the said Grantee owns an undivided one-half interest.

To have and to hold the above-described premises, unto the said Grantee and to his heirs and assigns in fee simple forever.

And I, the said Grantor, for myself and my heirs, executors and administrators, do hereby covenant with the said Grantee, and his heirs, executors, administrators and assigns, that I am seized of a good and indefeasible estate in fee simple in the above-described premises, and that I will, and my heirs, executors and administrators shall warrant and defend the title of the same against the lawful claims and demands of all persons whomsoever.

And I, Fung Shee, the wife of the above-named Grantor, in consideration [334] of the premises, do hereby sell and convey unto the said Grantee all of my dower and right of dower in and to the above-described premises.

In witness whereof, we have hereunto set our hands this 15th day of March, A. D. 1918.

L. AH LEONG.

her

FUNG X SHEE.

mark

First Judicial Circuit,  
City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 15th day of March, A. D. 1918, before me personally appeared L. Ah Leong and Fung Shee, his wife, known to me to be the persons described in and who executed the foregoing instrument and acknowledged the same as their free act and deed.

[Notarial Seal] JOHN MARCALLINO,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Entered of record this 21st day of March, A. D. 1918, at 3:21 o'clock P. M. and compared.

CHAS. H. MERRIAM,  
Registrar of Conveyances.

OFFICE OF THE  
REGISTRAR OF CONVEYANCES.

Honolulu, Hawaii, December 12th, 1921.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii, in Book 495, pages 37-38.

[Seal] Attest: (Sgd.) P. H. BURNETTE,  
Registrar of Conveyances for the Territory of Ha-  
waii.

[Endorsed on back:] Certified Copy Deed L. Ah Leong and Wf. to Lee Let. Dated March 15th, 1918. Recorded in Book 495, Pages 37-38, Registry of Conveyances for the Territory of Hawaii at Honolulu. [335]

U. S. Rev. S. \$1.00

WARRANTY DEED.

KNOW ALL MEN BY THESE PRESENTS, that I, L. Ah Leong, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the Grantor, for and in consideration of the sum of Seven Hundred (\$700.-00) Dollars, to me in hand paid by Yuen Chong and Lee Let, of Honolulu aforesaid, hereinafter called the Grantees, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred and conveyed and by these presents do grant, bargain, sell, transfer and convey unto the said Grantees, their heirs and assigns forever, all of the following described pieces or parcels of land, to wit: all of the said Grantor's undivided one-half interest in and to those certain pieces or parcels of land situate, lying and being at Kamakela, Honolulu aforesaid, and designated as Lot No. 8 and a portion of lot No. 8A upon a subdivision map made for Lee Let by M. D. Monsarrat, dated September 29, 1899, the same being a portion of Apana 1, R. P. 1985, L. C. A. 6245, and more particularly described as follows:

Lot No. 8.

45 ft. front;

77 ft. on the Waikiki side;

45 ft. on the Mauka side;

75.5 ft. on the Ewa side and containing  
an area of 3431 sq. ft. more or less;

Portion of Lot No. 8A.

75 ft. more or less on new Road;

17 ft. more or less on the Mauka side;

77 ft. more or less on the Ewa side and containing an area of 630 sq. ft., more or less; and being the same premises described in a certain deed from one Lee Let to the said Yuen Chong said deed being recorded in the Registry of Conveyances in Honolulu, in Liber 210, on page 94, and being the same premises now occupied by the said Grantees as the owners of an undivided one-half interest therein. [336]

To have and to hold the above-described premises unto the said Grantees and to their heirs and assigns in fee simple forever.

And I, the said Grantor, for myself, and my heirs, executors and administrators, do hereby covenant with the said Grantees and their heirs, executors, administrators and assigns that I am seized of a good and indefeasible estate in fee simple in the above described premises, and that I will and my heirs, executors and administrators shall warrant and defend the title of the same against the lawful claims and demands of all persons whomsoever.

And I, Fung Shee, the wife of the above-named Grantor, in consideration of the premises, do hereby sell, convey and release unto the said Grantees all of my dower and right of dower in and to the above-described premises.



In witness whereof, we have hereunto set our hands this 15th day of March, A. D. 1918.

L. AH LEONG,

her

FUNG X SHEE.

mark

First Judicial Circuit,  
City and County of Honolulu,  
Territory of Hawaii—ss.

On this 15th day of March, A. D. 1918, before me personally appeared L. Ah Leong and Fung Shee, his wife, known to me to be the persons described in and who executed the foregoing instrument and acknowledged the same as their free act and deed.

[Notarial Seal] JOHN MARCALLINO,

Notary Public.

First Judicial Circuit, Territory of Hawaii.

Entered on record this 21st day of March, A. D. 1918, at 3:22 o'clock P. M. and compared.

[Seal]

CHAS. H. MERRIAM,

Registrar of Conveyances. [337]

OFFICE OF THE  
REGISTRAR OF CONVEYANCES.

Honolulu, Hawaii, December 12th, 1921.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii, in Book 495, pages 38-40.

[Seal] Attest: (Sgd.) P. H. BURNETTE,  
Registrar of Conveyances for the Territory of  
Hawaii.

[Endorsed on back]: Certified Copy Deed L. Ah Leong & Wf. to Yuen Chong & Lee Let. Dated March 15th, 1918. Recorded in Book 495, Pages 38-40, Registry of Conveyances for the Territory of Hawaii at Honolulu. [338]  
U. S. Rev. S. \$1.50.

### DEED.

This Indenture made this 18th day of May, A. D. 1918, by and between L. Ah Leong, Grantor, and Lucia Duchalsky Dutra (wife of F. J. Dutra), Grantee, both of Honolulu, City and County of Honolulu, T. H., Witnesseth:

That the said Grantor for and in consideration of Twelve Hundred Dollars (\$1200) to him paid by said Grantee, the receipt whereof is hereby acknowledged, doth hereby grant, bargain, sell and convey unto said Grantee, her heirs and assigns forever all of his undivided one-half share and interest (and all other his right, title and interest) in and to that certain piece or parcel of land situate at Kamakela, Honolulu, aforesaid, being a portion of Apana 1, Royal Patent 1985, L. C. A. 6245, and particularly described as follows:

Commencing at the north corner of this lot on the makai side of road 25 feet wide and running:

S. 53° 50' W. true 207.3 feet along Lot 17;

S. 32° 50' E. true 42. feet along lane 5 feet wide;

N. 58° 48' E. true 217.4 feet along lane 10 feet wide;

N. 36° 10' W. true 59.6 feet along road to initial point, containing an area of 247/1000 acre.

To have and to hold the same together with all the rights, easements, privileges and appurtenances thereunto belonging or used and enjoyed therewith, and the back rents, issues and profits thereof, unto said Grantee, her heirs and assigns forever.

And the said Grantor doth hereby for himself, his heirs, executors and administrators covenant with said Grantee, her heirs and assigns that he is lawfully seized in fee simple of said granted premises; that the same are free and clear of all encumbrances; that he has good right to sell and convey the same as aforesaid; and that he will and they shall warrant and defend the same unto said Grantee, her heirs and assigns forever, against the lawful claims and demands of all persons.

And Fung Shee Ah Leong, wife of said Grantor, in consideration of the premises and of One Dollar to her paid, the receipt whereof is [339] hereby acknowledged, doth hereby release unto said Grantee, her heirs and assigns forever, all her right of dower in and to said granted premises.

And this Indenture further witnesseth that said Grantor in consideration of the premises, doth hereby release said Grantee and her husband, F. J. Dutra, from all costs of court and expenses for all suits or actions heretofore brought or pending by him against them.

In witness whereof the said Grantor and his wife have hereunto set their hands and seals the day and year first above written.

L. AH LEONG.

her

FUNG SHEE X AH LEONG  
mark.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 23d day of May, A. D. 1918, personally appeared before me L. Ah Leong and Fung Shee Ah Leong, his wife, known to me to be the persons described in and who executed the foregoing instrument and severally acknowledged that they executed the same as their free act and deed.

[Notarial Seal] JOHN MARCALLINO,

Notary Public, 1st Judicial Circuit, T. H.

Entered of record this 25th day of May, A. D. 1918, at 10:55 o'clock A. M. and compared.

CHAS. H. MERRIAM,  
Registrar of Conveyances.

OFFICE OF THE  
REGISTRAR OF CONVEYANCES.

Honolulu, Hawaii, December 12th, 1921.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii in Book 488 pages 249-251.

[Seal] Attest: (Sgd.) P. H. BURNETTE,  
Registrar of Conveyances for the Territory of  
Hawaii.

[Endorsed on back]: Certified Copy Deed L. Ah Leong & Wf. to Lucia D. Dutra. Dated May

18th, 1918. Recorded in Book 488, Pages 249-251, Registry of Conveyances for the Territory of Hawaii at Honolulu. [340]

U. S. Rev. S. \$1.00.

KNOW ALL MEN BY THESE PRESENTS, that we, L. Ah Leong and Fung Shee, his wife, for and in consideration of the sum of One Thousand Dollars (\$1,000.00), to us in hand paid by Wong Kwai Tong, the receipt whereof is hereby acknowledged and confessed, do by these presents bargain, sell, remise, release and quitclaim unto the said Wong Kwai Tong, his heirs and assigns forever, the following described property, to wit:

An undivided one-half interest in and of all that piece of land being Lot Seventeen (17) on map of property formerly occupied as the Buckle Homestead at Kamakela off Liliha Street, Honolulu aforesaid, said map having been made in May, 1891, by M. D. Monsarrat, and being part of the land described in Royal Patent 1895, Land Commission Award 6245, Apana 1, and bounded and described as follows:

Commencing at the north corner of this lot on Makaiside of road 25 feet wide, and running:

S. 53° 50' W. true 189.5 feet along lot 16;

S. 22° 15' E. true 77.2 feet along lane 5 feet wide;

N. 53° 50' E. true 207.3 feet along lot 18; thence N. 36° 10' W. true 75. feet along road to initial point. Area 34/100 acre, and being a portion of the premises conveyed to Carrie Wilcox (Sharratt) by a certain deed dated August 13, 1891, and recorded in Liber 133, page 220.



To have and to hold the above quitclaim premises, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining to the said Wong Kwai Tong, his heirs and assigns forever.

And I, Fung Shee, wife of said L. Ah Leong, in consideration of the premises, do hereby bargain, sell, remise, and forever quitclaim unto the said Wong Kwai Tong, all my dower and right of dower which I have or may have in the premises hereby conveyed. [341]

In witness whereof, we have hereunto set our hands this 28th day of June, 1919.

Witness: PHILIP C. WONG.

L. AH LEONG,

her

FUNG X SHEE.

mark.

First Judicial Circuit,  
City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 28th day of June, A. D. 1919, personally appeared before me L. Ah Leong and Fung Shee, known to me to be the persons described in and who executed the foregoing instrument and acknowledge to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth.

[Notarial Seal] PHILIP C. WONG,  
Notary Public, in and for the First Judicial Circuit.

Entered of record this 7th day of July, A. D. 1919, at 1:50 o'clock P. M. and compared.

P. H. BURNETTE,  
Registrar of Conveyances.

OFFICE OF THE  
REGISTRAR OF CONVEYANCES.

Honolulu, Hawaii, December 12th, 1921.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii in Book 514, pages 395-396.

[Seal] Attest: (Sgd.) P. H. BURNETTE,  
Registrar of Conveyances for the Territory of Hawaii.

[Endorsed on back]: Certified Copy Deed L. Ah Leong & Wf. to Wong Kwai Tong. Dated June 28th, 1919. Recorded in Book 514, Pages 395-396, Registry of Conveyances for the Territory of Hawaii at Honolulu. [342]

U. S. Rev. S. \$7.00.

KNOW ALL MEN BY THESE PRESENTS, that I, L. Ah Leong, of Honolulu, City and County of Honolulu, Territory of Hawaii, in consideration of the sum of Six Thousand Seven Hundred Dollars (\$6700.00) to me in hand paid, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto Jane Carrie Kapihe, Henry Peter Williams, David Kaapa Williams, James Kauhi Williams, Solomon Clement Williams and Mary Kaipo Williams, an undivided

one-half interest in fee simple in and to all that certain piece of land situated at Kamakela, Honolulu aforesaid, being a portion of the land described in Apana 3, of Land Commission Award 6245, Royal Patent 1983, and more particularly described as follows:

Commencing at the north corner of this at rock, and running:

S. 4° W. 106 feet;

S. 45° W. 45 feet along Puaaiki, thence;

S. 69° E. 127 feet;

N. 63° 15' E. 16 feet along Haupū; thence

S. 32° 13' E. 234 feet along Kaliu; thence

N. 84° E. 12 feet;

N. 32° 13' W. 240 feet;

N. 63° 15' E. 58 feet; from thence to the initial point; containing an area of 21,357 square feet, and being the same premises conveyed to J. Carrie Kaaukai (w) by deed of Herman Kockemann, Bishop of Olba, and recorded in the Office of the Registrar of Conveyances at Honolulu in Book 112, page 236.

To have and to hold the same with all the tenements, hereditaments, rights, privileges and appurtenances to the same belonging unto the said Jane Carrie Kapihe, Henry Peter Williams, David Kaapa Williams, James Kauhi Williams, Solomon Clement Williams and Mary Kaipo Williams, their heirs and assigns forever.

And I, Fung Shee, wife of the said L. Ah Leong, the grantor herein, [343] in consideration of the sum of One Dollar (\$1.00) to me paid, the receipt

whereof is hereby acknowledged, do hereby consent to the within grant by my said husband, and release and forever quitclaim unto the above-named grantees, their heirs and assigns forever, all my right, title, interest or estate in and to the above granted property, together with my right or possibility of dower therein and thereto.

In witness whereof, we, the said L. Ah Leong and Fung Shee, his Wife, have hereunto set our respective hands and seals this 9th day of November, A. D. 1920.

L. AH LEONG.

her

FUNG X SHEE.

mark

Witness to signature Fung Shee, my mother:

LAU AH TUNG.

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 9th day of November, A. D. 1920, before me personally appeared L. Ah Leong and Fung Shee, his wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged to me that they executed the same as their free act and deed.

[Notarial Seal]

P. D. KELLET,

Notary Public, First Judicial Circuit, Territory of Hawaii.

Entered of record this 9th day of November, A. D. 1920, at 3:25 o'clock P. M. and compared.

P. H. BURNETTE,

Registrar of Conveyances.

OFFICE OF THE  
REGISTRAR OF CONVEYANCES.

Honolulu, Hawaii, December 12th, 1921.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii in book 577, pages 81-82.

[Seal] Attest: (Sgd.) P. H. BURNETTE,  
Registrar of Conveyances for the Territory of Hawaii.

[Endorsed on back]: Certified Copy Deed L. Ah Leong & Wf. to Jane C. Kapihe et als. Dated November 9th, 1920. Recorded in book 577, pages 81-82, Registry of Conveyances for the Territory of Hawaii at Honolulu. [344]

From the Minutes of the United States District Court, Territory of Hawaii.

Volume 4, page 438.

Friday, April 12, 1907.

(Title of Cause.)

The Grand Jury came into Court this day and by its foreman returned a true bill of Indictment against said defendant charging unlawful cohabitation. And thereupon the Court ordered said Indictment filed and that a bench warrant issue herein and fixed bail in the same amount as heretofore fixed by the Commissioner.

United States of America,  
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do



hereby certify the foregoing to be a full, true and correct copy of the original minutes in the case of the United States vs. L. Ah Leong as the same remains of record and on file in the office of the Clerk of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August A. D., 1921.

[Seal]

WM. L. ROSA,  
Clerk.

By Wm F. Thompson, Jr.,  
Deputy Clerk. [345]

From the Minutes of the United States District  
Court, Territory of Hawaii.

Volume 4, page 442.

Saturday, April 13th, 1907.

(Title of Cause.)

Now comes said defendant in his own proper person and this cause being called for arraignment, defendant waives the reading of the indictment herein in English, and thereupon said indictment was read to said defendant in Chinese by the sworn interpreter, and for plea thereto defendant says he is guilty as charged. And thereupon on motion of the District Attorney this cause was continued until Wednesday,

April 17, 1907, at 10 o'clock A. M. for sentence.  
[346]

From the Minutes of the United States District  
Court, Territory of Hawaii.

Volume 4, page 449.

Wednesday, April 17th, 1907.

(Title of Cause.)

Now comes said defendant in his own proper person and this cause comes on for sentence and it being asked of him if he has anything to say why the sentence of the Court should not be pronounced against him, and nothing appearing or being shown it is ordered that said defendant pay a fine in the sum of \$300.00 and the costs of this prosecution.

And it is further ordered that said sentence be entered in full upon the Judgment Record of this Court. [347]

United States of America,  
— District of Hawaii,—ss.

In the District Court of the United States in and for — District aforesaid, at the April term thereof, A. D. 1907.

The Grand Jurors of the United States, impaneled, sworn, and charged at the Term aforesaid, of the court aforesaid, on their oath present, that L. Ah Leong on the 30th day of May, in the year 1905, in the said district, and within the jurisdiction of said court did unlawfully cohabit with more than one woman, to wit, with a certain woman named Ho Shee; with a certain woman named Dai Kim; and with a certain woman named Foong Shee; contrary to the form of the statute in such case made and

provided, and against the peace and dignity of the United States.

(Sgd.) ROBT. W. BRECKONS,  
United States Attorney.

[Endorsed]: No. 304. (Title of Court and Cause.) Indictment: Unlawful Cohabitation. (Sec. 5352 Amended by Act of March 22, 1882.) A True Bill. (Sgd.) Wm. W. Goodale, Foreman. Filed Apr. 12, 1907. (Sgd.) Frank L. Hatch, Clerk.

7—149.

United States of America,  
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct copy of the original indictment in the case of the United States vs. L. Ah Leong as the same remains of record and on file in the office of the Clerk of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August A. D. 1921.

[Seal]

WM. L. ROSA,  
Clerk.

By Wm. F. Thompson, Jr.,  
Deputy Clerk. [348]

United States of America,  
District of Hawaii,—ss.

In the District Court of the United States in and  
for the District and Territory of Hawaii.

Docket Number 304.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

L. AH LEONG,

Defendant.

### SENTENCE.

Now upon motion of J. J. Dunne, Esq., Assistant United States District Attorney in and for the District and Territory of Hawaii, the said defendant, L. Ah Leong is brought before the bar of this Court, and it being demanded of him if he has anything to say, why the sentence of the law, upon the plea of "guilty," heretofore entered by him in this cause, should not now be pronounced against him, says that he has nothing other or further to say than he has heretofore said.

WHEREUPON, it is considered by the Court that the said defendant, L. Ah Leong, pay a fine of \$300.00 and the costs of this prosecution, amounting to \$22.75, in all the sum of \$322.75.

Dated, Honolulu, Hawaii, April 17th, A. D. 1907.

(Sgd.) SANFORD B. DOLE,  
Judge U. S. District Court, Hawaii.

United States of America,  
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct copy of the original sentence in the case of the United States vs. L. Ah Leong as the same remains of record and on file in the office of the Clerk of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August A. D. 1921.

[Seal]

WM. L. ROSA,  
Clerk.

By Wm. F. Thompson, Jr.,  
Deputy Clerk. [349]

#### AFFIDAVIT OF F. E. THOMPSON.

Territory of Hawaii,  
City and County of Honolulu,—ss.

F. E. Thompson, being first duly sworn, deposes and says: That he is a member of the firm of Thompson, Cathcart & Ulrich, attorneys for Fung Dai Kim Ah Leong; also known and called "Fung Dai Kim"; also known and called "Fung Shee" (Foong Shee).

That during the month of August, 1921, your affiant was approached by J. Lightfoot, representing himself as attorney for L. Ah Leong, and presented with a form of Articles of Association of L. Ah Leong, Limited, and a Deed in connection



with said Articles, a true copy of which Deed so presented by J. Lightfoot being hereto attached and made a part hereof.

That affiant, acting for Mrs. Ah Leong (in the Deed of Conveyance attached hereto described as "Fung Dai Kim"), asked for time to take the matter up with said Fung Dai Kim; that a few days after the presentation of said Deed of Conveyance, L. Ah Leong called upon affiant, asked him to try to prevail upon "his wife" to sign said Deed of Conveyance; that in the witness clause of said Deed of Conveyance, said Fung Dai Kim (Fung Dai Kim Ah Leong) is described as the wife of L. Ah Leong.

(Sgd.) F. E. THOMPSON.

Subscribed and sworn to before me this 10th day of December, 1921.

[Seal] DORTHY O. DAVIDS,  
Notary Public First Judicial Circuit, Territory  
of Hawaii. [350]

KNOW ALL MEN BY THESE PRESENTS, that I, L. Ah Leong, of Honolulu, City and County of Honolulu, Territory of Hawaii, for and in consideration of the issuance to me of Two Thousand and Sixty (2060) fully paid up shares of the capital stock of L. Ah Leong, Limited, a corporation existing under the laws of the Territory of Hawaii, said shares being of the par value of Twenty-five Dollars (\$25.00), each; and for the further consideration of the issuance to the following named persons of the number of fully paid up shares of

said capital stock of said corporation set opposite their respective names, that is to say, to:

Fung Dai Kim .....	2000
Lau Ah Tung .....	400
Lau Ah Wong .....	400
Lau Ah Kong .....	100
Lau Ah Sang .....	100
La Ah Chung .....	200
Lau Ah Chu .....	200
Lau Ah Ping .....	100
Lau Fat Chan .....	60
Lau Ah Seong .....	60
Lau Ah Fong .....	80
Lau Ynuk Chan .....	80
Wong Tin Hen .....	80
Lau Chap Kun .....	80

And for the further consideration of the agreement evidenced by the acceptance of this deed on the part of said L. Ah Leong, Limited, to assume [351] and pay the indebtedness secured by mortgage and otherwise, hereinafter particularly referred to, and for the further consideration of the agreement of said L. Ah Leong, Limited, evidenced by the acceptance of this deed to keep and perform all covenants and agreements on the part of the lessee, to be kept and performed during the terms of the two leases hereinafter more particularly described, do hereby GIVE, GRANT, BARGAIN, SELL AND CONVEY unto said L. Ah Leong, Limited, all those certain pieces or parcels of land situate in the City and County of Honolulu,

Territory of Hawaii, and more particularly described as follows, to wit:

1. All that certain piece or parcel of land situate in Honolulu, City and County of Honolulu, Territory of Hawaii, within the block bounded by Hotel, Maunakea, King and Kekaulike Streets, fully described in owner's duplicate Certificate issued by the Land Court of the Territory of Hawaii, on September the 8th, 1919, and numbered 1303, said duplicate Certificate being issued on Original Certificate of Title, registered in Book 14, page 9, pursuant to the decree of said Land Court, dated the 28th day of August, 1919, and numbered 321; said decree being in the matter of the petition of Lau Ah Leong, numbered 431 in said Court.

2. All that certain piece or parcel of land fully described in deed made to L. Ah Leong by Mary E. Gorman, on the 12th day of May, 1915, and recorded in the Registry Office, Oahu, in Liber 420, on page 328.

3. All those certain premises described in a deed made to L. Ah Leong by Henry St. J. Nahaolelua and others, on the 16th day of May, 1912, and recorded in said Registry Office, in Liber 368, on pages 16 to 18.

4. All that certain piece or parcel of land situate at Kekihale, on Pauahi Street, between Maunakea and River Streets, Honolulu, aforesaid, conveyed to L. Ah Leong by deed of the Honolulu Library and Reading Room Association, dated October 2, 1909, and recorded [352]

in said Registry Office, in Liber 317, on pages 423 to 425.

5. All that piece or parcel of land situate on Beretania Street, Honolulu, aforesaid, being the premises conveyed to L. Ah Leong by deed of William A. Hall, dated September 25, 1909, and recorded in said Registry Office, in Liber 318, pages 259 to 260.

6. All that certain piece or parcel of land situate on the Mauka-Ewa corner of King and Aala Streets, Honolulu aforesaid, conveyed to L. Ah Leong by deed of William A. Hall, dated August 17, 1908, recorded in said Registry Office, in Liber 311, on pages 75 and 76.

7. All that piece or parcel of land situate at the northeast corner of King and Kekaulike Streets, beginning at the easterly corner of Kekaulike and King Streets, said corner being by true azimuth  $328^{\circ} 03' 126.1$  feet from a monument on a 10 foot offset to the Northeasterly line of King Street, at an angle in said street line Northwest of Kekaulike Street, and East  $288^{\circ} 25' 32.7$  feet from the center of a sewer manhole at the intersection of Kekaulike and King Streets, and running by true azimuths:

1.  $332^{\circ} 35' 42.5$  feet along the Northerly line  
of King Street;
2.  $247^{\circ} 49' 45.6$  feet along lane;
3.  $148^{\circ} 10' 50.7$  feet along Lot 2;
4.  $57^{\circ} 15' 41.7$  feet along Kekaulike Street  
to initial point.

Area 2022 square feet, and being portion of L. C. A. 28, R. P. 5.



8. All those certain pieces or parcels of land known as Lots 25 and 26, in Block 7, as the same are numbered and designated on map of lots at Kewalo, Honolulu, filed in the Office of the Registrar of Conveyances, and being the land conveyed to L. Ah Leong by deed of C. S. Desky, Trustee, dated October 22, 1897, and recorded in said Registry Office, in Liber 173, on pages 349 to 350.

9. All that certain piece or parcel of land situate on the makai side of School Street, Honolulu, aforesaid, being the land conveyed [353] to L. Ah Leong, by deed of M. T. Simonton, Commissioner, dated the 15th day of June, 1912, and recorded in said Registry Office, in Liber 368, on pages 338 to 340.

10. All that certain piece or parcel of land situate on the Westerly corner of Punchbowl and Queen Streets, Honolulu aforesaid, being more particularly described in the deed of the Trustees of the Estate of Bernice P. Bishop, deceased, to Queen Kapiolani, by deed dated May 12th, 1886, recorded in said Registry Office, in Liber 98, page 231.

11. All that certain piece or parcel of land situate on the East corner of Kinau and Lunalilo Streets, Honolulu aforesaid, conveyed to L. Ah Leong by deed of Milton Realty Co., Ltd., dated the 17th day of December, 1920, and recorded in said Registry Office, in Liber 576, on pages 428 to 430.

12. An undivided one-half ( $\frac{1}{2}$ ) interest in and to those said pieces or parcels of land situate



on the Waikiki side of Kekaulike Street, Honolulu aforesaid, described in Certificate of Title number 1741, document number 2729, Registry Book 18, page 169, of the Land Court of the Territory of Hawaii.

TO HAVE AND TO HOLD the same with all the rights and privileges and appurtenances thereunto belonging or in anywise appertaining unto the said L. Ah Leong, Limited, its successors and assigns forever.

And I, the said L. Ah Leong, for the consideration aforesaid, do hereby covenant with the said L. Ah Leong, Limited, that I am duly and lawfully seized in fee simple of the above described and granted premises; that they are free of all encumbrances, except:

(1) Mortgage of L. Ah Leong to the Bank of Honolulu, Ltd., recorded in Registry Office, Oahu, in Liber 440, on pages 209 et seq., and which mortgage was assigned to the Bank of Bishop and Company, on the 1st day of April, 1920, by instrument recorded in said office, in Liber 544, on pages 436 et seq.; and which mortgage covers the lands secondly, thirdly and seventhly, [354] hereinabove described, and upon which mortgage there is now due the sum of Fourteen Thousand Dollars (\$14,000.00).

(2) Mortgage of L. Ah Leong to H. Hackfeld and Company, Ltd., dated June 1st, 1913, recorded in said Registry Office, in Liber 374, on pages 261 et seq., which mortgage was assigned by said H. Hackfeld and Company, Ltd., to the Bank of Hon-

olulu, Ltd., on the 19th day of July, 1918, and which assignment is recorded in said office, in Liber 497, pages 118 et seq.; and which mortgage was assigned by the Bank of Honolulu, Ltd., to the Bank of Bishop and Company, on the 1st day of April, 1920, which assignment is recorded in said office, in Liber 544, on pages 436 et seq.; and which mortgage covers the lands firstly, fourthly, fifthly, sixthly and ninthly hereinabove described; and upon which mortgage there is now due the sum of Twenty-eight Thousand Dollars (\$28,000.00).

That I, the said L. Ah Leong, have good right to sell and convey the same as aforesaid, and that I will, and my heirs, executors and administrators shall WARRANT AND DEFEND the same unto the said L. Ah Leong, Limited, against the lawful claims and demands of all persons whomsoever.

And I, FUNG DAI KIM, wife of the said L. Ah Leong, in consideration of the premises, and for the further consideration of One Dollar (\$1.00) to me in hand paid, by said L. Ah Leong, Limited, the receipt whereof is hereby acknowledged, do hereby release and forever quitclaim unto the said L. Ah Leong, Limited, all my dower and right of dower in and to the above described and granted premises.  
[355]

And I, the said L. Ah Leong, for the consideration aforesaid, do hereby sell, assign, transfer and deliver unto the said L. Ah Leong, Limited, all my right, title and interest as lessee, in and to the following leases:

(1) Lease of Lena S. Holt and James L. Holt to L. Ah Leong, of certain premises situate on the corner of King and Liliha Streets, Honolulu, which lease is dated the 23d day of September, 1899, and recorded in the Registry Office, Oahu, in Liber 197, on pages 281 to 283, inclusive, and the term of which lease was extended for the period of ten (10) years, by instrument dated the 18th day of January, 1913, and recorded in said office, in Liber 393, on pages 74 and 75.

(2) Lease of Joseph Enos, otherwise known as Jose Ignacio d'Avellar, as lessor, to C. Ayan and others, doing business as Hop Sing Company, of certain premises situate on King Street, Honolulu aforesaid, and which lease is recorded in said office, in Liber 211, on pages 343 to 346, and which lease was assigned by said Hop Sing Company to me, the said L. Ah Leong, by instrument dated the 30th day of May, 1916, recorded in said office, in Liber 433, on pages 158 to 160 inclusive; provided, however, that the assignment of the aforesaid leases is on condition that the said L. Ah Leong, Limited, shall obtain the consent of said lessors, or their legal representatives, to said assignments.

TO HAVE AND TO HOLD the same unto the said L. Ah Leong, Limited, its successors and assigns, for and during the unexpired term of said leases.

And I, the said L. Ah Leong, for the consideration [356] aforesaid, do hereby give, sell, assign, transfer and deliver unto the said L. Ah. Leong,

Limited—

First: All those shares of stock as follows:

- 273 shares King Market, Ltd.;
- 250 shares Honolulu Canning Co., Ltd.;
- 35 shares Chinese Mutual Investment Co. of  
Hawaii, Ltd.;
- 5 shares Honolulu Soda-water Works;
- 5 shares O.K. Soda-water Works;
- 300 shares City Milk Co., Ltd.;
- 250 shares Oahu Market Co., Ltd.

Second: All the goods, wares and merchandise situate in my store and warehouse, King Street, Honolulu, or elsewhere;

Third: All the debts due and owing to me on open account, for goods, wares and merchandise sold and delivered, or otherwise.

TO HAVE AND TO HOLD the same unto the said L. Ah Leong, Limited, its successors and assigns forever, subject, however, to the payment of the following debts:

Notes, etc., payable.....\$ 7,500

Accounts payable.....120,000

IN WITNESS WHEREOF, we, the said L. Ah Leong and said Fung Dai Kim, his wife, have hereunto set our hands and seals, this 1st day of August, A. D. 1921.

\_\_\_\_\_  
\_\_\_\_\_.

[Endorsed on back]: Deed L. Ah Leong and Fung Dai Kim to L. Ah Leong, Limited. J. Lightfoot, Attorney for L. Ah Leong. [357]



## COPY.

Form No. 292.

United States of America,  
District of Hawaii,—ss.

In the District Court of the United States, in and for the District aforesaid, at the October term thereof, A. D. 1909.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present, that L. Ah Leong on the 25th day of October, in the year of our Lord eighteen hundred and eighty-six, did marry one Hung Shee, and her, the said Hung Shee, did then and there have for wife; and that the said L. Ah Leong afterwards, to wit, on the tenth day of February, in the year of our Lord nineteen hundred and eight, in the said District and Territory of Hawaii, and within the jurisdiction of said Court, did knowingly, unlawfully and feloniously marry and take as his wife one Ho Shee, otherwise called Ah Keau, and to the said Ho Shee, otherwise called Ah Keau, was then and there married; the said Hung Shee being then and there living and in full life, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Sgd.) ROBT. W. BRECKONS,

United States Attorney.

[Endorsed on back]: No. 630. District Court United States, District of Hawaii. The United States vs. L. Ah Leong. Indictment. Bigamy.



(Act Mch. 22, 1882, 1st Suppl. Rev. Stats., p. 331.)  
A True Bill. (Sgd.) Norman Watkins, Foreman.  
Filed Mch. 21, A. D. 1910. (Sgd.) A. E. Murphy,  
Clerk. [358]

UNITED STATES OF AMERICA.

In the District Court of the United States for the  
Territory of Hawaii.

To the Marshal of the United States of America  
for the Territory of Hawaii, and His Deputies,  
or Any or Either of Them—GREETING:

Whereas, at a District Court of the United States  
of America, for the Territory of Hawaii, begun and  
held at the City of Honolulu, Territory of Hawaii,  
within and for the District aforesaid, on the 21st  
day of March, A. D. 1910;

Whereas the Grand Jurors in and for the said  
District brought into the said court a true Bill of  
Indictment against L. Ah Leong charging:

Bigamy

(Act Mch. 22, 1882, 1st Suppl. Rev. Stats., p. 331 ),  
as by the said Indictment, now remaining on file  
and of record in said court, will more fully appear;  
to which Indictment the said L. Ah Leong has not  
yet appeared or pleaded;

NOW, THEREFORE, you are hereby com-  
manded, in the name of the President of the United  
States of America, to apprehend the said L. Ah  
Leong and him bring before the said court, at  
the United States Courtroom, in the City of Hono-  
lulu, to answer the Indictment aforesaid.

WITNESS the Hon. A. G. M. ROBERTSON,  
Judge of said District Court, this 21st day of

March, in the year of our Lord one thousand nine hundred and ten and of the independence of the United States the one hundred and thirty-fourth.

[Seal]

Attest: A. E. MURPHY,

Clerk.

By (Sgd.) F. L. Davis.

---

U. S. Attorney.

No. 630. District Court of the U. S. for the Territory of Hawaii. The United States of America vs. L. Ah Leong. Bench-warrant. Bail Fixed at \$———. ————, U. S. Attorney. Filed March 21, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

Marshal's Crim. Docket No. 1460.

Office of the United States Marshal, City of Honolulu, Territory of Hawaii.

In obedience to the Warrant, I have the body of the said L. Ah Leong before the Honorable the District Court of the United States, in and for the Territory of Hawaii, this 21st day of March, A. D. 1910.

(Sgd.) E. R. HENDRY,

U. S. Marshal. [359]

United States of America,  
District of Hawaii,—ss.

In the District Court of the United States in and  
for the District and Territory of Hawaii.

No. 630.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

L. AH LEONG,  
Defendant.

### SENTENCE.

Now, upon motion of Robert W. Breckons, United States District Attorney in and for the District and Territory of Hawaii, the said defendant L. Ah Leong, is brought before the bar of this court, and it being demanded of him what he has to say or can say, why the sentence of the law upon the plea of "*nolo contendere*" this day entered by him in this cause, should not now be pronounced against him, says he has nothing further or other to say than he has heretofore said,—

WHEREUPON, it is considered by the Court that the said defendant L. Ah Leong, be imprisoned in the United States Marshal's Office, Territory of Hawaii, for the period of one (1) hour.

IT IS FURTHER CONSIDERED BY THE COURT that the said defendant L. Ah Leong pay a fine of \$500.00, and the costs of this prosecution, amounting to the sum of \$20.35.

Dated Honolulu, T. H., April 2d, 1910.

(Sgd.) A. G. M. ROBERTSON,

Judge, United States District Court.

No. 630. United States District Court, Territory of Hawaii. United States of America vs. L. Ah Leong. Sentence. Entered in J. D. Book #2, at page 81. Filed April 2, 1910. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [360]

### UNITED STATES OF AMERICA.

In the District Court of the United States for the Territory of Hawaii.

The President of the United States of America to the Marshal of the United States for the Territory of Hawaii, GREETING:

WHEREAS, at the October, 1909, term of the District Court of the United States of America, for the Territory of Hawaii, held at the Courtroom of said Court in the City of Honolulu, in said District, to wit, on the 2d day of April, A. D. 1910, L. Ah Leong was convicted of the Crime: Bigamy (Act Mch. 22, 1882, 1st Suppl. Rev. Stats., p. 331), committed on or about the 10th day of February, A. D. 1908, in said District, and within the jurisdiction of said Court, contrary to the form of the statutes of the United States in such case made and provided and against the peace and dignity of the said United States.

AND WHEREAS, on the 2d day of April, A. D. 1910, being a day in the said term of said Court, said L. Ah Leong was, for said offense of which he

stood convicted as aforesaid by the judgment of said Court, ordered to pay a fine and costs of \$520.35 and to be imprisoned for the term of 1 hour to date from April 2d, A. D. 1910, and in default of the payment of said fine and costs, to be further imprisoned until the same be paid, or until he be otherwise discharged by process of law. And it was further ordered by the Court that said sentence of imprisonment be executed upon the said L. Ah Leong until the other or further order of the Court, by imprisonment in the U. S. Marshal's Office, Island of Oahu, Territory of Hawaii.

NOW, THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take and keep the said L. Ah Leong in your custody forthwith.

HEREIN FAIL NOT.

WITNESS the Honorable A. G. M. ROBERTSON, Judge of the District Court of the United States of America, for the Territory of Hawaii, this 2d day of April, A. D. 1910, and of our independence the one hundred and thirty-fourth.

[Seal]

A. E. MURPHY,

Clerk of said District Court.

By (Sgd.) F. L. Davis,

Deputy Clerk.

United States of America,  
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be full, true and correct copies of the original Indictment, Bench Warrant, Sentence and Commitment in the case of The



United States vs. L. Ah Leong as the same remains of record and on file in the office of the Clerk of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 16th day of August, A. D. 1921.

[Seal]

WM. L. ROSA,  
Clerk.

By Ritchie G. Rosa,  
Deputy Clerk.

[Endorsed on back:] No. 630. District Court of the U. S. for the Territory of Hawaii. The United States vs. L. Ah Leong. Commitment. 1 hour, Fine, \$500.00. Costs, \$20.35. Issued April 2, 1910. Filed on return Apr. 2, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

Marshal's Crim Docket No. 1460.

The within Warrant of Commitment was received by me on the 2d day of April, A. D. 1910, and is returned executed this 2d day of April, A. D. 1910.

(Sgd.) E. R. HENDRY,

U. S. Marshal. [361]

Form 123.

United States of America,  
District of Hawaii,—ss.

In the District Court of the United States; in and for District aforesaid, at the April Term thereof, A. D. 1907.

The Grand Jurors of the United States, impaneled sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present, that L. Ah

Leong on the 30th day of May, in the year 1905, in the said district, and within the jurisdiction of said court, did unlawfully cohabit with more than one woman, to wit, with a certain woman named Ho See; with a certain woman named Dai Kim; and with a certain woman named Foong Shee; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) ROBT. W. BRECKONS,  
United States Attorney.

[Endorsed]: No. 304. (Title of Court and Cause.)  
Indictment—Unlawful Cohabitation (Sec. 5352  
Amended by Act of March 22, 1882). A True Bill.  
Signed Wm. W. Gooddale, Foreman. Filed April  
12, 1907. (Sgd.) Frank L. Hatch, Clerk. [362]

United States of America,  
District of Hawaii,—ss.

In the District Court of the United States in and  
for the District and Territory of Hawaii.

Docket Number 304.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

L. AH LEONG,

Defendant.

### SENTENCE.

Now upon motion of J. J. Dunne, Esq., Assistant  
United States District Attorney, in and for the

District and Territory of Hawaii, the said defendant, L. Ah Leong, is brought before the bar of this court, and it being demanded of him if he has anything to say, why the sentence of the law upon the plea of "guilty" heretofore entered by him in this cause, should not now be pronounced against him, says that he has nothing other or further to say than he has heretofore said.

WHEREUPON, it is considered by the Court that the said defendant, L. Ah Leong, pay a fine of \$300.00 and the costs of this prosecution, amounting to \$22.75, in all the sum of \$322.75.

Dated, Honolulu, Hawaii, April 17th, A. D. 1907.

(Sgd.) SANFORD B. DOLE,

Judge, U. S. District Court, Hawaii. [363]

United States of America,

District of Hawaii,—ss.

In the District Court of the United States in and for  
the District and Territory of Hawaii.

No. 630.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

L. AH LEONG,

Defendant.

### SENTENCE.

Now upon motion of ROBERT W. BRECKONS, United States District Attorney in and for the District and Territory of Hawaii, the said defendant, L. Ah Leong, is brought before the bar of this court,

and it being demanded of him what he has to say or can say, why the sentence of the law upon the plea of "*nolo contendere*" this day entered by him in this cause should not now be pronounced against him, says he has nothing further or other to say than he has heretofore said.

Whereupon it is considered by the Court that the said defendant, L. Ah Leong, be imprisoned in the United States Marshal's Office, Territory of Hawaii, for the period of one (1) hour.

It is further considered by the court, that the said defendant L. Ah Leong pay a fine of \$500.00, and the costs of this prosecution, amounting to the sum of \$20.35.

Dated, Honolulu, T. H., April 2d, 1910.

(S.) A. G. M. ROBERTSON,

Judge United States District Court. [364]

Form No. 292.

United States of America,

District of Hawaii,—ss.

In the District Court of the United States, in and for the District aforesaid, at the October Term thereof, A. D. 1909.

The Grand Jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oath present, that L. Ah Leong on the 25th day of October, in the year of our Lord eighteen hundred and eighty-six, did marry one Hung Shee, and her, the said Hung Shee, did then and there have for wife; and that the said L. Ah Leong afterwards, to wit, on the tenth day of February, in the year of our Lord

nineteen hundred and eight, in the said District and Territory of Hawaii, and within the jurisdiction of said court, did knowingly, unlawfully and feloniously marry and take as his wife one Ho Shee, otherwise called Ah Keau, and to the said Ho Shee, otherwise called Ah Keau, was then and there married; the said Hung Shee being then and there living and in full life; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Sgd.) ROBT. W. BRECKONS,  
United States Attorney.

[Endorsed]: No. 630. (Title of Court and Cause.)  
Indictment—Bigamy (Act Mch. 22, 1882, 1st Suppl. Rev. Stats., p. 331). A True Bill. (Sgd.) Norman Watkins, Foreman. Filed Mch. 21, A. D. 1910. (Sgd.) A. E. Murphy, Clerk. [365]

No. 304.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

L. AH LEONG,

Defendant.

April 13th, 1907. Entering proceedings at arraignment, plea of guilty.

April 17th, 1907. Entering proceedings at sentence.



No. 630.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

L. AH LEONG,

Defendant.

April 2d, 1910. Entering proceedings at arraignment, plea of *nolo contendere* and sentence.

United States of America,

Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be full, true, and correct copies of the original Indictments, Sentences and docket records of arraignment, plea and sentences in cases of U. S. vs. L. Ah Leong, Nos. 304 and 630, as the same remains of record and on file in the office of the Clerk of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 8th day of December, A. D. 1921.

[Seal]

(Sgd.) WM L. ROSA,

Clerk.

By (Sgd.) Ritchie G. Rosa,

Deputy Clerk [366]

J. H. Ralston.

S. D. Willis.

G. W. Hott.

W. T. Rankin.

RALSTON & HOTT,  
Attorneys & Counsellors at Law.  
Washington, D. C.  
Evans Building.

January 10, 1922.

The Commissioner General of Immigration,  
Department of Labor,  
Washington, D. C.

Dear Sir:

In re: 55125/327, Ho Shee,  
Applicant for Admission at  
Honolulu as the wife of  
L. Ah Leong.

We represent Hung Shee who is the first wife of said L. Ah Leong and desire to be heard in opposition to the admission of the above-mentioned applicant.

We are advised that the papers on appeal have been forwarded to the Department, and respectfully request that we be advised when the record is ready for inspection.

Very truly yours,

RALSTON &amp; HOTT.

By G. W. HOTT.

GWH: MC. [367]

U. S. DEPARTMENT OF LABOR.  
IMMIGRATION SERVICE.

File 4393/1.

Office of Inspector-in-Charge,  
Honolulu, Hawaii.  
December 12, 1921.

The Honorable,

The Assistant Secretary of Labor,  
Washington, D. C.

(Thru the Commissioner-General of Immigration.)

Acknowledging your cablegram of the 10th instant re L. Ah Leong case, I have advised that before the hearing was begun by the Board of Special Inquiry, Attorney Frank Thompson was told to submit any evidence or witnesses he desired to present in the matter and the attorney for other interested parties has been given the same advice. Nothing was said or done from which Mr. Thompson could infer that any action would be taken without such an opportunity being afforded him, and the case is being conducted in a fair and impartial manner. Mr. Thompson, before any hearing was had or anything was said to him, advised me he had taken up the matter with the Department.

(Sgd.) RICHARD L. HALSEY,  
Inspector-in-Charge.

RLH: CR. [368]

## U. S. DEPARTMENT OF LABOR.

## IMMIGRATION SERVICE.

File 4393/1

Office of Inspector-in-Charge.

Honolulu, Hawaii.

December 12, 1921.

COPY.

The Honorable,

The Assistant Secretary of Labor,

Washington, D. C.

(Thru the Commissioner-General of Immigration.)

Acknowledging your cablegram of the 10th instant re L. Ah Leong case, I have advised that before the hearing was begun by the Board of Special Inquiry, Attorney Frank Thompson was told to submit any evidence or witnesses he desired to present in the matter and the attorney for other interested parties has been given the same advice. Nothing was said or done from which Mr. Thompson could infer that any action would be taken without such an opportunity being afforded him, and the case is being conducted in a fair and impartial manner. Mr. Thompson, before any hearing was had or anything was said to him, advised me he had taken up the matter with the Department.

Signed: RICHARD L. HALSEY,

Inspector-in-Charge.

RLH: CR. [369]

No. 55125/327.

COMMERCIAL RATE COLLECT.

December 10, 1921.

Immigration,

Honolulu.

Defer final action Ho Shee pending submission and consideration evidence from Frank Thompson, showing alleged husband, L. Ah Leong has legal wife living. Consult with Thompson.

HENNING.

Attest: (Sgd.) E. J. HENNING,  
Assistant Secretary.

CEB.

(Signed) E. J. HENNING,

Dec. 12, 1921.

Mail & files. [370]

CONFIRMATION OF TELEGRAM.

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

WASHINGTON.

No 55125/327.

COMMERCIAL RATE COLLECT.

December 10, 1921.

Immigration,

Honolulu.

Defer final action Ho Shee pending submission and consideration evidence from Frank Thompson,



showing alleged husband, L. Ah Leong has legal wife living. Consult with Thompson.

HENNING.

Attest: (Sgd.) E. J. HENNING,  
Assistant Secretary.

CEB.

The above is an official copy of telegram sent this day.

(Sgd.) ALFRED HAMPTON,  
Assistant Commissioner General. [371]

WESTERN UNION TELEGRAM, etc.

Received at  
A60SF Cable,  
Honolulu 177.  
CLT ARDSilman,  
New York.

Dec 9 AM 5 13

Go Washington ask Secretary Labor instruct Halsey Inspector of Port Honolulu not to admit Ho Shee Chinese woman claiming to be wife of L Ah Leong merchant until you receive certified copies record United States District Court showing sentence Ah Leong for unlawful cohabitation with applicant and sentence United States District Court of L Ah Leong for bigamy because of marriage to applicant while lawful husband of Hung Shee wife still living and undivorced whom he married thirty-nine years ago in Kohala Also certificates of judicial and public records showing recognition of Hung Shee as lawful wife during all that period and up to late in August this year Also certified copy original and supplemental complaint Circuit

Court showing marriage Ah Leong to Hung Shee  
Birth of fourteen children including two minors  
still living Accumulation through joint labor of  
Hung Shee and Ah Leong of seven hundred fifty  
thousand dollars which Ah Leong by deposing law-  
ful wife and installing applicant is attempting to  
keep entirely to self All documents go forward  
first outgoing steamer Advise.

TOMO. [372]

No. 55170/79.

August 26, 1921.

Immigration Service,  
Honolulu, T. H.

Unless good reasons to contrary exist, allow  
persons designated by court to inspect your regis-  
tration records Dai Kim and L. Ah Leong, connec-  
tion pending equity suit.

HENNING.

Attest: (Signed) E. J. HENNING,  
Assistant Secretary.

CEB.

PREPAID: Charge to account of J. Kuhio  
Kalaniana'ole, Delegate in Congress from Hawaii.  
[373]

No. 55170/79.

August 23, 1921.

Inspector-in-Charge,  
Immigration Service,  
Honolulu, T. H.

It has been brought to the attention of the De-  
partment, by Hon. J. Kuhio Kalaniana'ole, Delegate

in Congress from Hawaii, that, in connection with an equity suit pending in the courts of Hawaii, it is necessary to examine the record of the registration of one Dai Kim, *alias* Mrs. L. Ah Leong, and L. Ah Leong. Unless you know of some good reason to the contrary, it is directed that the appropriate person, designated by the court, be allowed to inspect said record, which is said to be a part of your files.

(Signed) E. J. HENNING,  
Assistant Secretary.

CEB. [374]

No. 55170/79.

August 23, 1921.

Hon J. Kuhio Kalanianaʻole,  
Delegate in Congress from Hawaii,  
Washington, D. C.

Sir:

In response to your letter of the 19th instant, I have to state that the Inspector-in-Charge, Immigration Service, Honolulu, T. H., has been instructed by letter, under to-day's date, to permit such person as may be designated by the court to inspect the registration records of Dai Kim, *alias* Mrs. L. Ah Leong and L. Ah Leong, provided the Inspector-in-Charge knows of no good reason why such inspection should not be allowed.

This Department, not having available to it any appropriation from which payment can be made of telegraphic charges in matters of this kind, has been unable to comply with your request that the

Inspector-in-Charge at Honolulu be wired to permit the inspection of the registration record.

Respectfully yours,

(Signed) E. J. HENNING,  
Assistant Secretary.

CEB. [375]

COMMITTEE ON AGRICULTURE.

House of Representatives U. S.

Washington, D. C.

August 19, 1921.

To the Honorable, The Secretary of Labor,  
Washington, D. C.

Sir:

It has become necessary to secure the record of the registration of Dai Kim, *alias* Mrs. L. Ah Leong and L. Ah Leong, Chinese residents of the Territory of Hawaii, as evidence in an equity suit pending in the Courts of the Territory of Hawaii.

The Official File of Chinese Registration is in the custody of Richard L. Halsey, who will not permit the examination of the Record for use as evidence, without the authority from your Department. It is not necessary that the Register be removed to Court for examination, but the desired evidence can be secured if an examination be had without the removal of the Register.

I would therefore respectfully request that Mr. Halsey be instructed by telegraph to permit the examination of the Registration of Dai Kim, *alias*

Mrs. L. Ah Leong and L. Ah Leong without removal.

Very truly yours,

J. KALANIANA'OLE,

Delegate in Congress from Hawaii. [376]

Filed Apr. 24, 1922. Wm. L. Rosa, Clerk.  
[377]

---

[Endorsed]: No. 4013. United States Circuit Court of Appeals for the Ninth Circuit. Richard L. Halsey, as Inspector-in-Charge of Immigration at the Port of Honolulu, Appellant, vs. Ho Ah Keau, Otherwise Known as Ho Shee, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District and Territory of Hawaii.

Filed April 21, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

---

In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Application of Ho Ah Keau, Otherwise Known as Ho Shee, for a Writ of Habeas Corpus. Stipulation Under Rule 23. Harry Irwin, Esq., Honolulu, T. H., Attorney for Ho Ah Keau, *alias* Ho Shee. William T. Carden, United States District Attor-



ney for the Territory of Hawaii, Fred Patterson, Assistant United States Attorney, Eaton H. Magoon, Assistant United States Attorney, Attorneys for Respondent, Richard L. Halsey.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

In the Matter of the Application of HO AH  
KEAU, Otherwise Known as HO SHEE, for  
a Writ of Habeas Corpus.

**Stipulation Under Rule 23.**

IT IS STIPULATED by and between the parties hereto that those portions of the record herein found on pages 187 to 215, inclusive, and being the proceedings upon the application for the admission of Lau Yan Lum and Lau Yin Tai into this country as Hawaiian-born citizens, be omitted from the printed record herein, the same having been included in the record of the trial court only by virtue of the fact that said proceedings were bound in the same cover in the records of the Immigration Department with the cases of Hung Shee and various children of Lau Ah Leong, and the said portions of the record not bearing in any way upon the issues in this cause.

Dated, Honolulu, T. H., April 10th, 1923.

HO AH KEAU, *alias* HO SHEE.

By HARRY IRWIN,

Her Attorney.

RICHARD L. HALSEY,

Immigration Inspector-in-Charge, Port of Honolulu.

By WILLIAM T. CARDEN,

United States Attorney for the District and Territory of Hawaii.

[Endorsed]: No. 4013. United States Circuit Court of Appeals for the Ninth Circuit. Filed April 24, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4013

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

---

RICHARD L. HALSEY, as Inspector in  
Charge of Immigration at the Port of  
Honolulu.

*Appellant,*

vs.

HO AH KEAU, otherwise known as  
HO SHEE,

*Appellee.*

---

UPON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF AND TERRITORY  
OF HAWAII

---

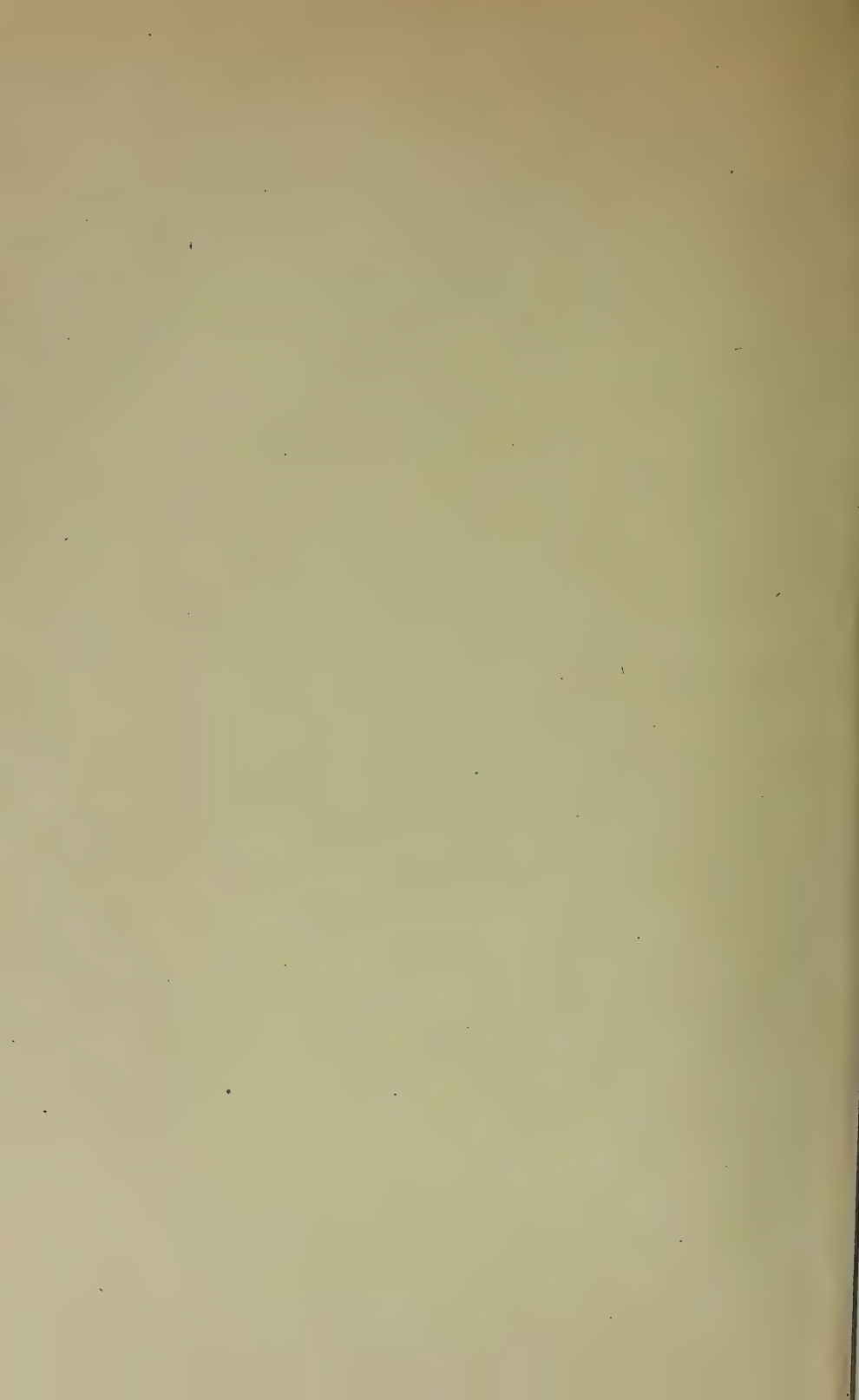
**BRIEF ON BEHALF OF APPELLEE**

---

---

HARRY IRWIN,

Attorney for Appellee.



# INDEX

	Pages
I. STATEMENT OF THE CASE.....	1 - 8
Argument .....	8 -62
II. THE APPLICANT WAS NOT GIVEN A FAIR HEARING BEFORE THE SECRE- TARY OF LABOR.....	8 -23
A. Appellate Jurisdiction of Secretary of Labor .....	10-16
B. New Evidence Before the Secretary of Labor .....	16-21
C. Lack of Notice as to Questions con- sidered on Appeal.....	21
D. E. Erroneous Theory Upon which Ap- peal was heard as constituting an Unfair Hearing .....	22-24
F. Applicant's Right to Notice and Hearing before the Secretary of Labor .....	24-25
III. THE QUESTION OF IDENTITY.....	25-33
IV. ARE COMMON LAW MARRIAGES VALID IN HAWAII? .....	34-44
V. HUNG SHEE'S RELATIONS WITH L. AH LEONG .....	44-51
VI. HO SHEE'S RELATIONS WITH L. AH LEONG .....	51-53
VII. THE QUESTION CONCERNING HO SHEE'S PRACTICE OF AND BELIEF IN POLYGAMY.....	54-56
VIII. THE BURDEN OF PROOF.....	56-58
IX. UNIFORMITY OF ADMINISTRATION OF IMMIGRATION LAWS .....	58-60
X. EXTRANEOUS MATTERS .....	60-62
Conclusion .....	62-63





No. 4013

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

---

RICHARD L. HALSEY, as Inspector in  
Charge of Immigration at the Port of  
Honolulu.

*Appellant,*

vs.

HO AH KEAU, otherwise known as  
HO SHEE,

*Appellee.*

---

UPON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF AND TERRITORY  
OF HAWAII

---

**BRIEF ON BEHALF OF APPELLEE**

---

I.

STATEMENT OF THE CASE.

In the year 1883 there arrived in Honolulu a Chinese woman known as HUNG SHEE (Record Page 314). Shortly after her arrival

she began to live with L. Ah Leong, at Kohala on the Island of Hawaii (Record page 315). Seven months thereafter Ah Leong and Hung Shee moved to Honolulu and continued to live together up to the year 1891, during which interval of time four children were born to them (Record pages 317, 318). In that year, 1891, Ho Ah Keau, otherwise known as Ho Shee, the petitioner herein, but who will be hereafter referred to as the "Applicant" arrived in Honolulu, and on the 25th day of May, 1891, was married to Ah Leong, after a license had been duly issued for that purpose, by C. M. High, a person duly authorized to perform the marriage ceremony, the record of which was duly made in the Bureau of Vital Statistics of the Board of Health of the Kingdom of Hawaii (Record page 16). At the time of this marriage Ah Leong was a naturalized subject of the kingdom (Record page 162) and it is admitted that he is now an American citizen (Appellant's Brief page 2). The Applicant continued to live and cohabit with Ah Leong and to bear children by him and so far as the record shows there was never any question raised as to the validity of their relations and of the marriage until the year 1905, shortly after the decision in *Godfrey vs. Row-*

*land* which was decided on January 16th, 1905. Prior to the decision in that case Ho Shee was recognized as the wife of Ah Leong and when Lawyer Magoon was buying a piece of land which Ah Leong had previously transferred without Ho Shee's signature he required Ho Shee to sign the deed (Record page 320). It was not until after the decision in *Godfrey vs. Rowland* that any question was raised by the Federal authorities as to the legality and validity of the relations between Ah Leong and the Applicant (Record page 457). Notwithstanding the proceedings had in the Federal Court under the indictment of 1907 (Record pages 456, 457) Ah Leong and the applicant apparently continued to live together as husband and wife until the year 1910 when a second indictment was returned against him (Record page 450). This second prosecution of Ah Leong for his relations with the applicant seems to have convinced him that under the law as it was then interpreted by the Supreme Court of Hawaii he could not further continue those relations. Acting on the advice of his lawyer (Record page 44) who no doubt had in mind the decision in *Godfrey vs. Rowland* he entered a plea of *nolle contendere* and was sentenced to be imprisoned in

the office of the United States Marshal for one hour and to pay a fine of \$500.00. In that year, 1910, Ho Shee, the applicant, departed for China and remained there until her attempted return to Hawaii on December 7th, 1921, when she sought entry into the United States as the legal wife of Lau Ah Leong, an American citizen. The Board of Special Inquiry convened in Honolulu on December 9th, 1921. The proceedings had before the Board are set forth in the Record on pages 14 to 53, and after a hearing all the members of the Board apparently, and two of them certainly, decided that the applicant was the legal wife of Lau Ah Leong and had proven her identity as such (Record pages 49-52). Two of the members of the Board voted to admit her "as the wife of a naturalized citizen" (Record page 50) but the third member of the Board, apparently concurring in the views of the majority that the Applicant is the wife of a citizen and identified as such voted to exclude her on the sole grounds that she is a person who (a) believes in and practices polygamy and (b) has made false and misleading statements to the Board of Special Inquiry (Record page 53) and upon those grounds only appealed to the Secretary of Labor, the only question presented on said appeal being



whether or not the applicant (a) practiced or believed in polygamy and (b) had made false and misleading statements to the Board. The Appeal was heard by a "Board of Review" whatever that body may be or however it may be constituted.

Two legal gentlemen, yclept Ralston and Hott, appeared throughout the proceedings on appeal on behalf of Hung Shee the so-called No. 1 wife. On January 20th, 1922, the assistant commissioner general was so solicitous of the rights of Hung Shee in the premises that notice was given to said Ralston and Hott that the record in the Ho Shee case "is ready for your inspection" and allowing them ten days within which to review the same and submit a brief (Record page 289). No such notice was given to the attorneys representing Ho See, the person primarily interested in the proceedings. On January 31st, 1922, said Ralston and Hott filed a brief and requested an oral hearing (Record page 289). On February 4th, 1922, there was filed in the case an unsigned "memorandum for the Assistant Secretary" but which is endorsed "Ralston & Hott. Oral hearing requested" (Record pages 61 to 68). This maverick document purports to be a memorandum by some unknown

“Special Assistant” but we strongly suspect that the special assistant’s name was “Hott.” On February 8th, 1922, Attorney Hott was heard and on the same day the so-called Chairman of the Board of Review filed its or his recommendation “That the appeal be denied” (Record pages 58 to 60). In view of the fact that Mr. Hott urged that “the present appeal be denied” (Record page 58) it is strongly suspected that the Board of Review, the personel of which is not otherwise disclosed in the record, consisted of Robe Carl White and Mr. Hott. It is thus seen that from January 20th, the date when the record was announced as being ready for inspection, to February 8th, the date when the hearing was closed, a period of only 19 days, no opportunity was afforded the applicant, or her attorneys, for an inspection of the record, or to appear at the hearing. It is apparent from a consideration of Exhibit “A” (Record page 58), Exhibit “B” (Record page 69) and Exhibit “C” (Record page 70), that the appeal was heard upon the theory that the Special Board of Inquiry had voted to exclude the applicant upon the ground that she was not the person she claimed to be and upon the further ground that if she was the per-

son she claimed to be she was not the legal wife of L. Ah Leong.

Another very important fact to be kept in mind is the fact that the appeal of the dissenting member of the Board was not sustained even under the amended letter to the Inspector in Charge (Exhibit "B" Record page 69). The finding of Robe Carl White as set forth in Exhibit "A" (Record pages 59, 60) and which so far as can be determined from the record is the only finding which purports to be an official one, sets forth clearly that the two grounds upon which the recommendation was based were (a) that the best evidence favors the recognition of the validity of the marriage between Hung Shee and Leong and (b) that it (the Board of Review) further believes that the real Ho Shee is not identical with the present applicant. There was no finding or decision by the Secretary of Labor, or any of his subordinates that the applicant practiced polygamy or believed in the same or that the applicant had made false and misleading statements to the Board of Inquiry. On the 1st day of March, 1923, the applicant filed in the United States District Court at Honolulu her petition for a writ of Habeas Corpus and the matter was heard and determined by the Court

on the said petition, an amendment thereto, the return of Mr. Halsey to the writ, and the demurrer of the petitioner to the said return. The demurrer to the return was sustained by the District Court Judge (Record pages 99-111) and on the 4th day of October, 1922, a judgment was entered discharging the petitioner from further imprisonment by the respondent in said case (Record pages 123, 124).

---

## ARGUMENT

### II.

#### THE APPLICANT WAS NOT GIVEN A FAIR HEARING ON THE APPEAL TO THE SECRETARY OF LABOR.

It is seriously and respectfully urged that the proceedings had before the Department of Labor and Bureau of Immigration, on the appeal taken from the Board of Special Inquiry constituted a mere semblance of a passing upon the matters raised by said appeal and were prejudiced and unfair in the following respects, namely:

(a). That the Bureau of Immigration and the Secretary of Labor had no jurisdiction to re-

view the decisions of the Board of Special Inquiry not made the subject matter of the appeal by the dissenting member.

(b). That the Board of Review, the Bureau of Immigration and the Assistant Secretary of Labor heard and determined the appeal upon matter not presented by said appeal.

(c). That no notice was given to the applicant or her attorneys that in considering the appeal of the dissenting member of the Board, the questions relating to the indentity of the applicant and the validity of the marriage were to be reconsidered.

(d). The Board of Review held its hearings and made its findings and recommendation to the assistant Secretary of Labor upon the theory that the case was before it on an appeal by the applicant.

(e). That the Assistant Secretary approved of the findings of the Board of Review upon the theory that the said appeal was the appeal of the applicant and not the appeal of a dissenting member of the Board of Special Inquiry.

(f). That while the attorneys for a person privately interested in the case were given ample notice of the completion of the record and an opportunity to inspect the same, file a brief and



make oral argument, no such notice or opportunity was given to the applicant, or her attorneys.

(g). That the Board of Review based its findings and recommendation on evidence which was not before the Board of Special Inquiry and which the applicant had no opportunity to refute.

#### A.

### APPELLATE JURISDICTION OF SECRETARY OF LABOR.

The Secretary of Labor gets his appellate jurisdiction in cases of this kind from Section 17 of the Immigration Act which provides in part as follows:

“And the decisions of any two members of the Board shall prevail but either the alien or any dissenting member of said Board may appeal through the Commissioner of Immigration to the Secretary of Labor and the taking of *such appeal* shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the Commissioner of Immigration at the port of arrival of *such decision* which shall be

rendered solely on the evidence adduced before the Board of Special Inquiry."

Laws conferring powers of this nature on administrative officers must be strictly construed.

"Laws which confer judicial discretion upon administrative officers must be construed with a degree of strictness requisite to make them consonant with the spirit of the fundamental doctrine of the Constitution."

*In re Tang Tung*, 168 Fed. 488.

*In re Gang Gong*, 161 Fed. 618.

There can be no doubt that the members of the Board of Special Inquiry were unanimously agreed upon the question of identity of the applicant and her marriage to Ah Leong. The dissenting member of the Board concedes these questions when she says, "It might be well to know that if *the woman Ho Shee* had never been in Hawaii before and was coming here for the first time—she would be denied on the ground that she had not proved that she was the wife of the person whom she came to join" (Record page 52). The dissenting member, concurring in the views of the other members on the question of identity and marriage to Ah Leong, based her appeal solely on the grounds stated by the Chairman as follows:

“One member has dissented from the majority of the Board and voted to deny you on the ground that you are a person who believes in and practices polygamy and as a person who has made false and misleading statements to the Board of Special Inquiry and has appealed from the decision of the Board.” (Record page 53).

The question then for consideration under specification “A” is as to whether or not an appeal by one member on particular grounds opens up the whole case for review by the Secretary of Labor and gives him jurisdiction to reverse the Board on matters unanimously decided by them in favor of the applicant. Section 17 of the statute as above quoted is not definite on the point and a careful examination of the decisions discloses no case in point. The writer believes that no exact parallel to this case can be found in the adjudicated cases. It is therefore, on this point, a case of first impression in this Court and must be decided on principles of justice and fairness to the applicant.

The Secretary of Labor has no authority to review a unanimous decision of the Board of Special Inquiry admitting an alien and it was so held in *Lun Jew vs. United States*, 196 Fed. 736 at 742 in which case the Court said:

“Where, however, the decision of the customs or immigration officers is favorable to the right of Chinese persons to enter the United States the same is not reviewable by the Secretary of the Treasury or the Secretary of Commerce and Labor.”

In the instant case the decision of the Immigration officers was favorable to the right to remain in the United States except for the opinion of one member who believed she should be excluded on the grounds above stated, an opinion absolutely disregarded by the Board of Review, the Bureau of Immigration and the Assistant Secretary of Labor. Those officials paid no attention whatever to those questions but proceeded to reverse the Board of Inquiry upon matters as to which its members were unanimous. While the Courts have repeatedly held that Immigration officials, in matters of this kind, are not bound by the strict rules of judicial procedure, yet the proposition that an appeal should be heard and determined only upon the matters and things included within the appeal is such a fundamental principle and such a fair one that a denial of the proposition is a denial of a fair hearing.

“Immigration officials cannot disregard the fundamental principles insuring fairness to

an alien in establishing their rules of evidence in proceedings to deport an alien."

*Chin Loy You*, 223 Fed. 833.

And in the same case it was said:

"There is, however, a tendency in the decisions of the Supreme Court (of the United States) on the subject of safe-guarding the individual against the tremendous and arbitrary power given to the Immigration Bureau by reserving to the Courts the right to scrutinize with some freedom the fairness of the proceedings."

If under the ruling in the *Chin Loy You* case, the Immigration authorities are not allowed to disregard fundamental principles in establishing rules of evidence, neither should they be allowed to disregard fundamental principles in the rules of procedure. After the termination of the hearing before the Board of Special Inquiry the applicant was technically in custody, not upon any question of her identity, or of her legal relations with Ah Leong, but only upon the matters raised by the appeal and upon those matters no hearing was had and no decision rendered. A somewhat similar question arose in *Davies vs. Manolis*, 179 Fed. 818. In that case the petitioner had been arrested in deportation proceedings under Act of February 20th, 1907. The evidence



before the Inspector showed that the petitioner had arrived in the United States in 1906 and that he did not come within the purview of the Act of 1907. The case came before the Secretary of Commerce and Labor for review, who after the hearing issued a warrant for the arrest and deportation of the petitioner for violation of the Act of 1903. On Habeas Corpus the District Judge discharged the prisoner and the Circuit Court of Appeals sustained his action, its decision reading in part, as follows:

“Nevertheless final determination of the statute applicable to the case and interpretation (to say the least) *of the grant of power therein cannot* rest with the executive officers, nor can such finality of executive decision have sanction under our system of government. Whatever may be the powers, even of judicial nature vested in such officer for needful and summary enforcement of the governmental policy, we believe the ultimate decision of the fundamental question must rest with the Courts \* \* \* The further question (under either of the acts referred to) *whether the accused was granted a hearing in fact upon the charge for which he is held in custody is likewise open to judicial inquiry on this writ.* \* \* \* Under the conceded state of the record *with no hearing granted by the department in any*

form of violation (as now alleged) of the Act of 1903, we believe no sanction appears for the order of deportation even on the assumption (a) that such act authorized deportation for the cause stated in the order, or, (b) that the testimony reported by the Inspector showed a violation of the contract labor laws. Whatever were the subsequent proceedings or conclusions in the Department they were ex parte and the final order for re-arrest was without a hearing and unauthorized."

It is respectfully submitted that when the Board of Review, the Bureau of Immigration and the Assistant Secretary of Labor attempted to hear and determine the appeal in this case on matters and questions not submitted to them, they were acting without jurisdiction and their unlawful exercise of jurisdiction in that regard constituted an unfair hearing.

## B.

### NEW EVIDENCE BEFORE THE DEPARTMENT OF LABOR.

Section 17 of the Immigration Act provides that the Appeal to the Secretary of Labor "shall be rendered solely on the evidence produced before the Board of Special Inquiry." The proceedings had before the said Board are found in

the record from pages 14 to 53 inclusive and are certified to be correct by the stenographer. We find, however, in the record, copies of various documents, which at some time subsequent to the hearings before the Board of Special Inquiry and which, according to its record, were not before that Board when its decision was rendered, were surreptitiously inserted therein by some person and forwarded to the Secretary of Labor who therefore had before him and considered evidence not before the Board of Special Inquiry. The Departmental officers therefore clearly violated the provisions of the above quoted section of the statute and if they were influenced in the slightest degree by this additional evidence the hearing was unfair and illegal. That they were so influenced is plain from a reading of the record. Take the statement contained in Exhibit A (Record page 58) where Mr. Robe Carl White says:

“It appears that the alleged husband in this case is a very wealthy man being reputed to be worth about \$750,000.00 and it is apparent that there are some steps on foot to defeat the interests of the alleged legal wife, Hung Shee.”

No such evidence appeared in the proceedings had before the Board of Special Inquiry and

this piece of information must have been obtained from the Divorce libel filed surreptitiously with the record before the Secretary of Labor (Record page 409). This information or evidence must have influenced the views of the Chairman of the Board of Review, otherwise he would not have made it one of his findings. Take again the ex parte statement contained in said Divorce Libel (Record page 410), "that for a period of 29 years and over, the said libellee (L. Ah Leong) had lived in open and notorious adultery with numerous women, including one Ah Keau, otherwise known as Ho Shee." While the statements contained in the libel relating to Ah Leong might not and certainly should not affect Ho Shee's rights in this case, Ex parte statements such as the above, if believed by the Departmental officers, would be very prejudicial to the rights of the applicant. In this connection we beg to call the Court's attention to the case of *Chew Hoy Quong vs. White*, 249 Fed. 869. This was a case decided in the Circuit Court of Appeals of the Ninth Circuit. It appears that Chew How Quong was a Chinese merchant domiciled in the United States. He went to China and there married a wife whom he brought with him on his return to the United



States arriving at the port of San Francisco. A hearing was had before the inspector who reported favorably on the application of the merchant's wife for admission to the United States but thereafter the Commissioner ordered a re-examination, the result of which was that Quok Shee's application was denied and that, upon her appeal from that decision, the Secretary of Labor ordered that she be deported. The applicant then filed a petition for writ of habeas corpus alleging that the hearing was unfair in that after the appeal had been taken the attorneys for Quok Shee were denied the privilege of interviewing her for the purpose of further evidence in support of her appeal. Also that in the records of the immigration authorities it appears that their decision was influenced by a confidential communication which they had received in reference to the right of Quok Shee to admission into the United States, which confidential communication was forwarded to the Commissioner of Labor to be considered on the appeal as is shown from the following extracts:

"This is one of the three cases in which the Department received apparently authentic confidential information going to show that the women involved were being brought to this country for immoral purposes."



And the petitioner alleged upon information and belief that the immigration authorities decided his wife's application for admission to the United States adversely by reason of such confidential information which was not permitted to be of record and was not known to petitioner or Quok Shee or her attorneys. The writ of habeas corpus was denied in the District Court and an appeal taken to the Circuit Court of Appeals, where Gilbert, J. said:

"The denial of the right of the applicant's attorneys to interview her pending the determination of her application by the immigration authorities was, we think, in itself sufficient ground for holding that the hearing was unfair. Aside from that, we hold that the fact that the immigration authorities received a confidential communication concerning the applicant's right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was sufficient to constitute the hearing unfair. However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive or contents of which are not disclosed to the appli-

cant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

"The judgment is reversed and the cause is remanded, with instructions to issue the writ."

### C.

Assuming for the purposes of this argument only that the Secretary of Labor had jurisdiction to consider and determine the case on questions not raised by the appeal, it is our contention that the exercise of that jurisdiction without notice to the applicant or her attorneys constituted an unfair hearing. The Applicant and her attorneys had the right to rely on the record as sent up to the Secretary of Labor and did rely on it. We had no notice that any matter outside of the two questions raised by the Appeal would be considered. While the fact is not shown in the record in this case the brief filed by the applicant's attorneys with the Department of Labor dealt exclusively with the question of polygamy and the alleged false statements of the applicant and did not discuss the other questions at all. A statement to this effect was made on page 3 of our reply brief in the District Court and has never been challenged by counsel on the other side.

## D. AND E.

THE ERRONEOUS THEORY UPON  
WHICH THE APPEAL WAS HEARD  
CONSTITUTED AN UNFAIR HEAR-  
ING.

Specification D. and E. above call attention to the fact that the Board of Review determined the appeal upon the theory that the applicant was the appellant and that the Assistant Secretary of Labor approved of their findings upon the same theory. The very fact that they did so consider it is persuasive evidence of an unfair hearing. The record is clear on this point. Mr. Hott appeared before the Board of Review and "urged that the appeal be denied" (Record page 58) and it was recommended that "the appeal be denied" and it was "so ordered" by the Assistant Secretary (Record page 60). Following that is the letter of February 11th, 1922, (Exhibit "C" Record page 70) in which the Inspector in charge in Honolulu was advised "that the appeal of Ho Shee, alias Ho Ah Keau has been dismissed." Then follows the letter of correction (Exhibit "B" Record page 69) which strengthens the evidence in support of specifications "D" and "E." for the explanation is

made that the error was due to the fact that "most appeals are taken by aliens excluded." Then comes the letter of March 6th, 1922, from the Assistant Commissioner General (Record page 145) where in attempting to explain the mistake he says that "As the Bureau recalls the matter the recommendation of the Board of Review was that "the appeal be denied and deportation proceeded with" (Record page 146), a very lame excuse for the reason the Board of Review said nothing whatever about deportation at all (Record page 60) until March 6th, 1922, when the amended finding of the Board of Review was filed (Record page 145). A very different situation would have been before the Board of Review if the appeal had in fact been by the applicant. In such a case the Board of Review would have had the advantage of a majority or perhaps unanimous action of the Board of Inquiry excluding the alien and might very well rely to a large extent upon the fact that a majority or perhaps all of the members of the Board of Inquiry had come to their conclusions on the facts after an opportunity to examine the witnesses, to observe their demeanor on the stand and to judge of their credibility. Under such circumstances there might be some slight rea-



sons upon which the "denial of the Appeal" would be justified.

But in this case the entire Board of Inquiry sustained the applicant on all the material points in the case which presented a very different situation to the Board of Review. But notwithstanding this, when Robt Carl White discovered his error, without holding any further hearings of the mythical Board of Review, he amended the decision so that it reads exactly the converse of what it originally said and the Assistant Secretary promptly approved of the same. It is difficult to cite any law upon a proposition of this kind as to the effect such action has upon the question of a fair hearing, but it seems to the writer that the action of the Board of Review was such a "disregard of the fundamental principles insuring fairness to an alien" as to bring it within the spirit of the condemnation of such practices as was expressed by the Court in *Chin Loy You, supra*.

## F.

### THE APPLICANT'S RIGHT TO A HEARING AND NOTICE OF HEARING BEFORE THE SECRETARY OF LABOR.

While the Federal Courts are not entirely in accord upon the right of the excluded alien to



appear by Counsel before the Secretary of Labor it is very generally held that the alien is entitled to a hearing before the Secretary.

*Tsoi Soi vs. United States, 116 Fed. 920.*

*Ex parte Tsuie Shee, 218 Fed. 256.*

If it be true that the alien has a legal right to a hearing then it is equally true that he has a right to notice, otherwise the right to a hearing would be valueless. In this case the Departmental officers were generous in the matter of giving notice to Ralston & Hott and in affording them every opportunity to be heard, both orally and by written brief. The fundamental principles governing fairness to the applicant would seem to require that at least equal opportunity should be given to the applicant in this case, the person primarily interested in its outcome.

### III.

#### THE QUESTION OF IDENTITY

We now wish to discuss the question as to whether or not the applicant is the person she claims to be, namely the person who came to Hawaii and married Ah Leong in 1891, and in discussing this question we have the advantage of the fact that the three members of the Board of Special Inquiry, after hearing the evidence and

after an opportunity on their part to observe the witnesses and their manner of testifying, unanimously decided this question of identity in favor of the applicant. In the case of *Ex parte Long Lock*, 173 Fed. 208, the Court said:

“This petitioner was before Inspector Perry who saw him and observed his manner of giving testimony. The Inspector was far better able to judge of his candor and truthfulness than any Court or Judge can be.”

The following facts in evidence before the Board of Special Inquiry prove beyond any doubt that the applicant is the original Ho Shee who came to Hawaii in 1891.

(1). She presented to the Immigration official at the port of arrival the certificate required by Section 6 of the Chinese Exclusion Act, 2 Fed. Stat. Ann. page 71 (Record page 16). It is unfortunate that this particular document referred to in the record on page 16 as an “Affidavit” is not printed in the record herein. This feature of the case was urged in the District Court, however, and argued in our brief there, the following statement having been made in our brief: “This certificate, with photograph attached, duly vised by the American Consul in Hongkong, the port of departure, was produced

by the petitioner upon her arrival at the port of Honolulu." This statement was not controverted by counsel on the other side at that time nor since.

The Section of the Chinese Exclusion Law above referred to reads as follows:

"It shall be his duty (that is, the Consul's duty) before endorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to endorse the same. Such certificate as aforesaid, SHALL BE PRIMA FACIE EVIDENCE OF THE FACTS SET FORTH THEREIN."

By the production of this certificate she not only made out a prima facie case of identity but a prima facie case of her right to land in the United States which prima facie case must be overcome by the government.

In the case of *Jew Sing vs. United States*, 97 *Federal* 583, referring to another certificate giving a Chinese the right to remain in the United States, it was said:

"Certificates issued under the act have a meaning and value. They are the evidence of the right of the holder to remain in the Coun-

try. The right thus conferred is a valuable one, to be taken away by the courts only upon clear proof that the holder has committed some act which would deprive him of the privilege of remaining in the United States. The certificate makes out a *prima facie* case in behalf of the right to remain. To overcome the presumptions arising from the possession of the certificate, the testimony should be clear and convincing, and until the government has made out such a case the holder of the certificate is not required to make further proof."

In the case of the *United States vs. Wong Chung*, 92 *Federal* 145, it was said:

"When a Chinese person is brought before a United States Commissioner the burden is upon him to establish his right to remain. This he does by introducing his certificate. The burden then shifts and the United States must produce some proof to overcome this *prima facie* evidence or it will be the commissioner's duty to discharge the defendant."

(2) She brought with her and produced her original marriage certificate dated May 25th, 1891, certifying that she was married to L. Ah Leong on that date, signed by C. M. High (authorized to perform the marriage ceremony) and witnessed by Ah Lo (Record page 16).

(3). She brought with her one Lau Ah Chong



and testified that he was born in Hawaii of her marriage to L. Ah Leong (Record page 17).

(4). The said Lau Ah Chong was admitted as Hawaiian born and as the son of the applicant and said L. Ah Leong, on the testimony of the applicant, himself, and L. Ah Leong (Record 53).

(5). Lau Chong testified, upon his application for admission, that he came on the same steamer with his mother, Ho Shee, the applicant herein; that his father was L. Ah Leong; that he was born in Hawaii; that he had seen his father, L. Ah Leong in China in 1919; that he was, at the time of the hearing, 12 years old and that he left Hawaii when he was 2 years old (Record pages 24-25).

(6). L. Ah Leong testified that the applicant is his wife and identified the applicant and Lau Chong as his wife and son (Record page 33).

(7). The record in the Immigration Station shows that Ho, Ah Keau, and her son, Lau Chong departed from Honolulu by S. S. Korea, on January 13th, 1910 (Record page 18).

(8). Hung Shee, who claims to be the legal wife of L. Ah Leong, and who appeared before the Board of Special Inquiry in opposition to the admission of the applicant and whose attorneys



are still active in that regard, positively identified the applicant as the original Ho Shee (Record page 43), testified that the applicant came to Hawaii in 1891, that she had lived together in the same house with the applicant for some years, that the applicant had returned to China a week after the witness, Hung Shee, had returned to China in 1910 (Record page 42). No stronger evidence of identity than that given by Hung Shee could be desired. She was then and still is using every effort to prevent the admission of Ho Shee into the Territory. Her interest would be to deny that Ho Shee was identical with the original Ho Shee. This is not a case of possible error on the part of this witness. Both Ho Shee and Hung Shee are mature women and Ho Shee was a mature woman when she left Hawaii in 1910. Hung Shee in giving the testimony which she did was either telling the exact truth with regard to the identity of Ho Shee, or she was deliberately lying in favor of Ho Shee, and the latter hypothesis is an impossible one.

(9). That in the libel for divorce filed with the record in the Department of Labor it is alleged that L. Ah Leong had lived in open and notorious adultery with one Ah Keau, otherwise known as Ho Shee (Record page 410) and that

in the affidavit filed by F. E. Thompson, one of Hung Shee's attorneys, in support of a supplemental libel, it is alleged that since the filing of the original libel Ho Shee, otherwise known and called Ah Keau, has, upon the solicitation and expense of said libellee (Ah Leong), arrived at the port of Honolulu where she seeks to enter as the wife of said L. Ah Leong (Record page 402). The supplemental libel was ordered filed and Hung Shee therein swore that Ho Shee, otherwise known as Ah Keau, had arrived in the Port of Honolulu (Record page 404).

There is no cause for wonder that, in the face of this mass of testimony, the District Judge found that "every witness who testified before the Board of Special Inquiry identified the petitioner as being the original Ah Keau and there is not one scintilla of evidence, so far as I have been able to discover, on which to base a contrary finding" (Record page 109).

Counsel for the appellant, on pages 25 to 29 of their brief, argue at some length the proposition that discrepancies in the testimony may be good ground for a refusal to admit. Such discrepancies, however, cannot be made the basis for a mere excuse for such refusal; they must be such as would produce in the mind of a fair

mind man a doubt as to the identity. They can not, merely because of such discrepancies, arbitrarily refuse to accept credible and unimpeached testimony and all of the cases cited by counsel that bear on this question support this theory. The case of *Kwong Jan Fet vs. White*, 253, U. S. 455, 64 L. Ed. 1010, a case involving a question of identity clearly and succinctly lays down the rule in this regard.

"It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were "manifestly unfair," were "such as to prevent a fair investigation," or show "manifest abuse" of the discretion committed to the executive officers by the statute (*Low Wah Sey vs. Backus, supra*), or that "their authority was not fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." "*Tang Tun vs. Edsell*, 223, U. S. 673, 681, 682, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 359. The decision must be after a hearing in good faith, however summary (*Chin You vs. U. S.*, 208, U. S. 8, 12, 52 L. ed 369, 370, 28 Sup. Ct. Rep. 201), and it must find adequate support in the evidence (*Zakonaite vs. Wolf*, 226 U. S. 272, 274, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31)."

The last portion of the above quoted excerpt which holds that the decision by the Secretary of Labor *must find adequate support in the evidence* is well sustained by the case cited in support thereof.

*“The findings of fact upon which were based an order of the Secretary of Commerce and Labor for the deportation \* \* \* of an alien found to be practicing prostitution within three years after her entry into the United States, are not subject to review by the Courts, if the evidence was adequate to support the Secretary’s conclusions and the alien was given a fair hearing.”*

*Zakonaite vs. Wolf, 226 U. S. 272.*

*“For where there is jurisdiction, a finding of fact by the executive department is conclusive \* \* \* and the Courts have no power to interfere unless there was a denial of a fair hearing \* \* \* or the finding was not supported by the evidence \* \* \* or there was an application of an erroneous rule of law.”*

*Ng Fung Ho vs. White, 259 U. S. 276.*

It is respectfully submitted that the decision of the Assistant Secretary on this question of identity finds “no adequate support in the evidence” and is therefore, under these decisions not conclusive on the Courts.



## IV.

## ARE COMMON LAW MARRIAGES VALID IN HAWAII?

Before proceeding to discuss the evidence bearing upon the relations existing between Hung Shee and Ah Leong and between Ho Shee and Ah Leong we wish to discuss the law of Hawaii governing the marriage relations. The proposition that the *lex loci contractus* governs the legality and validity of a marriage is so well established as to need no citation of authorities, but authorities on that point are cited by the hundreds in Vol. 2, Chapter XX, 6th Edition of Schouler on Marriage, Divorce, Separation and Domestic Relations. The validity of Ah Leong's marriage with Ho Shee must be determined solely by the laws of Hawaii and the determination of that question by this court must be upon a construction of the Laws of Hawaii solely. There is no such law as a Federal marriage law. The laws of Hawaii relating to marriage stand on the same footing as the laws of a state.

Section 6 of the Hawaiian Organic Act provides that the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in



force subject to repeal or amendment by the Legislature of Hawaii or the Congress of the United States. There is no doubt but that Congress in the Exercise of its plenary power over Territories could provide a marriage law for this Territory but until it does so the statutory laws of Hawaii govern the question and the Courts, including the Courts of the United States, can construe and interpret them merely.

The latest declaration on this subject by the Supreme Court of this Territory is found in *Parke vs. Parke*, 25 *Haw.* 397. The decision in that case is based on a construction of the following provisions of the Revised Laws of Hawaii, 1915, namely:

“Section 8. PROHIBITORY. Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.”

“Section 2905. WHEN VALID. Requisites of contract:

“It shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from the agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated.”

It is conceded that the law as set forth in these sections has not been materially altered since its

original enactment in 1872. The Supreme Court of Hawaii in this carefully considered opinion expressly overruled *Godfrey vs. Rowland*, 16 Haw. 377, and called attention to the fact that the Court in the former case made no reference to Section 8 above quoted and must have overlooked it.

“If Section 2905 R. L. 1915 could properly have been considered entirely without relation to any other contemporaneous statute we would be inclined to agree, as held in the *Godfrey-Rowland* opinion, that the provision relating to a license is merely directory because unaccompanied by any provisions of nullity. But there existed at that time a statute which must have been overlooked by the Justices of the Supreme Court when engaged in formulating that opinion, that is, section 8 of chapter 3 R. L. 1915, which is to be found under the heading “Operation of Laws,” and which reads as follows: “Section 8. PROHIBITORY. Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.” Laws upon the same subject are construed with reference to each other and it thus becomes necessary to consider these two statutes in *pari materia*. It is provided in section 2905 that “it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly ob-

tained from an agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated." Here we have a law which is clearly prohibitory but which within itself contains no words of nullity. Section 8, however, supplies this deficiency and expressly renders null and void whatever is done in contravention of a prohibitory law. A prohibitory law is defined as "one which forbids all actions which disturb the public repose, or injury to private rights, or crimes or misdemeanors, or certain actions in relation to the transmission of estates, the capacity of persons, or their objects" (26 A. & E. Enc. L. 533). Neither in the opinion nor in the entire record in the *Godfrey-Rowland* case is section 8 mentioned, and we must therefore conclude that had the court been aware of its existence the *Godfrey-Rowland* opinion would not have been rendered. In the very earliest laws enacted in these islands there is plainly expressed a determined effort to protect morality and the social order as well as the rights of property by requiring a marriage license as a prerequisite to the right to marry and providing penal consequences for a violation of that requirement. In section 11, chapter 10, laws 1842 (see Fundamental Law of Hawaii), it is provided that "Those who desire to be united in wedlock shall first go to the governor or to his agent, and obtain a written

assent to their marriage, and then it shall be proper for the priest to solemnize the marriage." And in section 12 it is provided: "If any one disregard \* \* \* the XI section of this law, or if any one shall unite persons in marriage in a manner at variance with any part of this law, he shall be fined one hundred dollars." These enactments clearly demonstrate an early determination on the part of the lawmakers in these Islands to add vitality to the loose and doubtful marriage system which had grown up under the common law and to make of marriage a homogeneous, stable and certain institution. It is true the statutes of 1842 were merely penal and contained no words of nullity but when at a later date sections 8 and 2905 were enacted this defect was provided for."

This being the latest declaration on this subject by the Court of Last Resort in the Territory, counsel for the appellant urge:

FIRST. That the question of a common law marriage was not actually involved in the *Parke* case.

SECOND. That the Supreme Court of Hawaii was bound by the decisions of the Supreme Court of the United States in *Meister vs. Moore*, 96 U. S. 76 and *Travers vs. Reinhardt*, 205 U. S. 423 and



THIRD. That the Supreme Court of Hawaii was without jurisdiction to overrule *Godfrey vs. Rowland*:

FIRST. So far as this particular point is concerned exactly the same situation existed in *Meister vs. Moore, supra*, as existed in the *Parke* case. That was a case where the Supreme Court of the United States, in construing the marriage statute of Michigan followed the decision of the Supreme Court of that State as announced in *Hutchens vs. Kimmel* 31 Mich. 126. In this latter case the Supreme Court of Michigan had under consideration the validity of a foreign marriage which, of course, could not be determined by the laws of the state of Michigan. The Supreme Court of Michigan, however, took occasion to announce its views on the question of a common law marriage in that state but the Supreme Court of the United States, notwithstanding the fact that the statements of the Michigan Court relative to the validity of a common marriage did not appear to be necessary to the decision of that case, followed the Michigan Court and said:

“It is unnecessary, however, to pursue this line of thought. If there has been a construction given to the statute by the Supreme Court of Michigan, that construction must, in this case, be controlling with us. And we think the



meaning and effect of the statute has been declared by that court in the case of *Hutchens vs. Kimmel*, 31 Mich., 126, a case decided on the 13th of January, 1875. There, it is true, the direct question was, whether a marriage had been effected in a foreign country. But, in considering it, the court found it necessary to declare what the law of the State was \* \* \*. We cannot regard this as mere obiter dicta. It is rather an authoritative declaration of what is the law of the State, notwithstanding the statute regulating marriages.

SECOND. Neither *Meister vs. Moore* nor *Travers vs. Reinhardt*, *supra*, purported to announce any Federal law of marriage. In both cases the Supreme Court of the United States followed the decisions of the State Courts in this matter. The discussion of *Meister vs. Moore*, above, clearly shows this.

*Travers vs. Reinhardt* is perhaps a stronger case as authority for the proposition that the Supreme Court of the United States follows the state Courts in this regard. In that case Travers started to live with Sophia Grayson in the state of Virginia under circumstances which constituted a common law marriage. Immediately after the marriage they moved to New Jersey where, as husband and wife, they remained a short time.

They then moved to Maryland and lived in that State as husband and wife for about 16 years when, in 1883, they again moved to New Jersey and lived there until his death which took place the same year. The case came to the Supreme Court of the United States on an appeal from the Court of Appeals of the District of Columbia and involved the question of the legitimacy of the children born to Travers and Sophia Grayson. The Supreme Court of the United States recognized the decisions in Virginia and Maryland holding common law marriages invalid in those States and also followed the decision of the New Jersey Courts holding that common law marriages were valid in the latter State. The Supreme Court held the marriage valid because the parties had lived together in the State of New Jersey as man and wife and were recognized as such in that state. It is clear, therefore, that if this Court shall hold common law marriages valid in Hawaii, it must do so, not upon any theory of a Federal Law of Marriage, or upon any theory that the Supreme Court of the United States has announced any such law, but solely upon the theory that such marriages are recognized by the laws of Hawaii.

THIRD. The new and, to the writer, strange

doctrine is announced on page 64 of Appellant's Brief where it is contended in effect that the Supreme Court of Hawaii was without jurisdiction to overrule the decision in *Godfrey vs. Rowland*. According to this argument the law of Hawaii, as interpreted by the Supreme Court of Hawaii prior to 1905 became as fixed as the laws of the Medes and Persians. No matter how erroneous those decisions may have been the Supreme Court of Hawaii, according to this contention, is without jurisdiction to correct those errors.

This argument is based solely on the fact that in 1905 the appellate jurisdiction of the United States Supreme Court over the Supreme Court of Hawaii was enlarged by giving the former Court appellate jurisdiction in all cases involving over \$5,000.00. According to this argument the Supreme Court of Hawaii is a Court of last resort in all cases involving \$5,000.00, but loses that status if the amount involved is \$5,000.01.

While this exact question was not involved in *Territory of Hawaii vs. Hutchinson Sugar Co.*, 272 Fed. 856, this Court used expressions which do not seem to indicate that the Supreme Court of the Territory had lost its status as a Court of Last Resort. It was there said,

“The appellant and the appellee differ as

to the purpose and meaning of these two decisions of the Supreme Court of the Hawaiian Islands, but we consider the decision of the Supreme Court of the Islands in the case at bar a final determination of the law of the Territory which is binding on this Court."

Counsel for appellant further argue that because there have been two codifications and reenactments of the marriage statutes of Hawaii since the decision in *Godfrey vs. Rowland* the legislature of Hawaii must be considered as having set the seal of its approval upon the decision in that case. The rule of construction contended for by counsel is undoubtedly supported by authority, but it is a rule of construction merely and is always qualified by the statement that such a construction will be followed unless plainly erroneous, and this was the view announced by Mr. Justice Holmes in *Copper Queen Mining Co., vs. Arizona*, 206 U. S. 474, cited in Appellant's brief on page 68. The decision in *Godfrey vs. Rowland* was so clearly erroneous that this rule of construction cannot apply. In that case the provisions of Sec. 8. R. L. H., 1915, which, as clearly pointed out by the Court in the Parke case must be read into Section 2905, R. L. H., 1915, and made a part thereof.



It is proper to point out here that prior to the decision in *Godfrey vs. Rowland* common law marriages were not considered valid in Hawaii and the Trial Judge in that case instructed the jury that "in order to find a marriage between Frank and Alice Metcalf, you must find that a license to marry was obtained."

## V.

### HUNG SHEE'S RELATIONS WITH L. AH LEONG.

Assuming now that the identity of the applicant with the original Ho Shee has been established and that common law marriages are not recognized in Hawaii we come to a consideration of the evidence bearing on the relations between Hung Shee and L. Ah Leong. It is submitted that the evidence shows conclusively, and affirmatively, that at the time of the so-called marriage of Hung Shee and Ah Leong at Kohala, Hawaii, no license to marry had been obtained by the parties as required by Hawaiian law, as interpreted by the Supreme Court in *Parke vs. Parke, supra*. Hung Shee's own testimony is conclusive on this point. She testified that the only paper she had was a paper which her mother made out for her before she left China



and which she gave to Ah Leong and that she was married to him according to the Chinese custom. This paper was merely the written consent of Hung Shee's mother that she might pick out any man she wanted (Record pages 37, 38); and on August 3, 1922, when she applied for Form 430, she testified that no marriage license was obtained when she married Leong (Record page 39). Ah Leong's testimony is direct and positive on this point also and stated "I was not married to this woman. She simply lived with me for a period of time" (Record page 30) and that "she does not want to get married to me. She wants my money so afterwards I married Ho Shee" (Record page 32). He further testified that "one was married to me and one was not \* \* \* the woman that is coming here was married to me" (Record page 43); and that prior to the decision in *Gofdrey vs. Rowland* Lawyer Magoon had required Ho Shee's signature to a deed (Record page 45). The evidence also shows that Inspector Farmer searched the records of the Board of Health in Honolulu, where all vital statistics are filed, and found no record of any marriage between Hung Shee and Ah Leong (Record page 48). The only direct evidence in the record upon this question tends to show and

does show that no marriage license issued. Certainly if it can be said by this Court that a license issued it would have to be on some theory of presumption, such as is announced in *Estate of Kalamau, supra*, but as before pointed out that presumption prevails only in the absence of a showing that would prevail against it. In this case we have not only the direct evidence of Ah Leong that no license issued, but we have also the admission of Hung Shee to the same effect and the fact that the public records fail to show any such marriage or license. In addition to this we have the stronger presumption which arises through the production of a subsequent marriage license issued to L. Ah Leong and Ho Shee and the formal marriage of the parties thereafter.

The presumption of a valid marriage arising from reputation and cohabitation is overcome by the showing of a second marriage solemnized as required by law.

*Case vs. Case, 17 Cal. 598.*

*McKibbin vs. McKibbin, 139 Cal. 448.*

*Jones vs. Jones, 48 Md. 391.*

*In re Sloan's Estate, 96 Pac. 624.*

The presumption of a valid marriage arising from reputation and cohabitation is also overcome by a showing that there was cohabitation

by one person with others at the same time.

*Bishop Mar. Div. and Sep. 1027-8.*

Hung Shee testified that while Ah Leong was living with her he was also cohabiting with Ho Shee (Record page 40) and that Ah Leong had one other wife still living in China and two that are dead and that was while she was living in Honolulu with Ah Leong (Record 41). It is respectfully submitted that not only does the evidence show affirmatively that no license was issued but also that any presumptions that might have arisen through repute and cohabitation were destroyed by the facts and counter presumptions above indicated.

But it is strenuously urged by counsel for appellant that Ah Leong's previous conduct and testimony show a marriage between him and Hung Shee. The fact that Ah Leong pleaded guilty to two charges preferred against him in the District Court of the United States in Hawaii arising out of his relations with Hung Shee and Ho Shee was considered by the Assistant Secretary of Labor as important evidence in arriving at his conclusion "that the best evidence favors the recognition of the validity of the marriage between Hung Shee and Leong" (Record page 60). Just how Ah Leong's admissions or pleas

in such cases can affect Ho Shee's rights is difficult to understand. She was not a party to those proceedings, and knew nothing whatever about them. If she was, in fact, married to Ah Leong, the latter could plead guilty to all the matrimonial crimes imaginable without in any way affecting her marriage status.

The fact that Hung Shee also joined with Ah Leong in the execution of deeds to real property is also relied on by appellant's counsel as evidence tending to show a marriage between Hung Shee and Ah Leong. But the acts of Hung Shee and Ah Leong in this regard can have no effect on Ho Shee's rights. Such acts might have a tendency to show a common law marriage. These facts, however, may become of importance as tending to discredit Ah Leong's testimony when he said that he never regarded Hung Shee as his wife under Hawaiian Laws (Record page 29). But a consideration of all the circumstances shows that Ah Leong, at all times when he made these admissions and statements, was undoubtedly acting under the compulsion of the decision in *Godfrey vs. Rowland*, as above pointed out, and it is very significant, that all of this evidence relates to a time subsequent to the decision in *Godfrey vs. Rowland*. There can be



no doubt but that Ah Leong entered into a valid marriage with Ho Shee in 1891. The record is bare of any evidence tending to show that, between 1891 and the time when *Godfrey vs. Rowland* was decided, Ah Leong ever made an admission, direct or otherwise, that Hung Shee was his wife, and it is significant that the only deed referred to in the record during that time required Ho Shee's signature. But immediately upon the announcement of the decision in *Godfrey vs. Rowland* the situation was entirely changed. Very shortly thereafter he was charged in the District Court with unlawful cohabitation, and to which, no doubt acting under the force of said decision in *Godfrey vs. Rowland*, he pleaded guilty. Now Ah Leong was a well-known merchant in Honolulu (Record page 170) and his plea of guilty to such a charge would attract the attention of a large number of people and particularly the attention of the lawyers. Under these circumstances any lawyer who examined a title for his client who might be a prospective purchaser of any of Ah Leong's real estate would require the release of dower by Hung Shee, and this is entirely consistent with Ah Leong's testimony (Record page 45) where he said "When I sell my land the buyer wants the



signature of my wife; I said that my wife was in China but the buyer said this woman's signature will do." And again on page 47 of the record he says "the one that fixes the deed asks my wife to sign it but I never ask her to sign it."

It appears clear, from all the evidence and the proper inferences to be drawn therefrom, that the lawyers, having in mind the decision in *Godfrey vs. Rowland*, were the ones who insisted that Hung Shee should sign the deeds. This situation continued up to the time when the *Parke* case was decided.

But upon the rendition of the decision in the *Parke* case the situation changed again and Ah Leong found that, while under the decision in *Godfrey vs. Rowland* he had been compelled, against his will, to recognize Hung Shee as his wife, under the *Parke* decision he was required to recognize Ho Shee as his wife, a situation that would puzzle most laymen and quite a number of lawyers. Shortly after the decision in the *Parke* case Ah Leong refused to give testimony before the Collector of the Port of Honolulu to the effect that Hung Shee was his wife and claimed that Ho Shee was his legal wife (Record page 42).

It is respectfully submitted that while Ah

Leong's relations with different women cannot be too severely condemned, yet his actions have at all times been consistent with his repeated assertions that Ho Shee is his legal wife, and that any departure from such consistency is explained by the fact that he was acting under the compulsion of the doctrine announced in *Godfrey vs. Rowland*.

## VI.

### HO SHEE'S RELATIONS WITH AH LEONG.

Here we have positive and exact proof that a formal marriage was entered into between Ah Leong and Ho Shee on the 25th day of May, 1921, upon a license duly issued for that purpose (Record page 16), four days after her arrival in Honolulu (Record page 23.)

This marriage was followed by cohabitation between the parties until 1910, a period of 19 years, when the applicant returned to China. During this period five sons and two daughters were born to them (Record page 17). The records of the Board of Health are full and complete on this point, the testimony of Ho Shee and Ah Leong is definite and positive and even Hung Shee does not deny the marriage for she says

that "they may have been secretly married" (Record page 40). Assuming that Ah Leong's alleged common law marriage is out of the way by reason of the decision in the *Parke* case the evidence establishes beyond any doubt the fact and the validity of the marriage between Ah Leong and Ho Shee. Appellant however, insists that we have not sustained the burden of proof in this regard and says that there was evidence before the Board that the cohabitation between Ah Leong and Ho Shee was meretricious in its origin because, as he says, Hung Shee discovered that Ho Shee was pregnant ten months after her arrival in Honolulu. This statement illustrates the lengths to which counsel are willing to go in their attempt to break down the evidence of a valid marriage. It is admitted by all parties that Ho Shee did not arrive in Honolulu until 1891. The record evidence shows that she was married in May of that year. Disregarding entirely Ho Shee's testimony that she was married to Ah Leong four days after her arrival in Honolulu, and assuming that she arrived in Honolulu on January 1st, 1891, then Hung Shee discovered that Ho Shee was pregnant in October, 1891, five months after her marriage with Ah Leong. Considering Ah Leong's ability

along these lines as shown by the record, it is not improbable that Ho Shee was pregnant in October, 1891, but that fact does not show nor tend to show that her relations with Ah Leong were originally meretricious.

Counsel for Appellant say that the evidence in support of the marriage between Ah Leong and Ho Shee was "patently false and fabricated for the occasion," a statement so absolutely without foundation that one wonders how a public official acting in a public capacity could bring himself to the point of uttering it. Was the original marriage certificate issued thirty-one years before, produced by the applicant on her arrival in Honolulu, patently false and fabricated for the occasion? Were the public records in the Board of Health patently false and fabricated for the occasion? Was the testimony of Lau Ah Chong, the twelve-year-old son of the applicant and admitted as such, patently false and fabricated for the occasion? Was the testimony of Hung Shee that the applicant and Ah Leong may have been secretly married patently false and fabricated for the occasion?



## VII.

THE QUESTION CONCERNING THE  
APPLICANT'S PRACTICE OF AND  
BELIEF IN POLYGAMY.

Counsel for appellant on pages 50 to 56 of their brief argue that the evidence fully sustains the finding of the Secretary of Labor that the applicant practices and is a believer in polygamy. They expended a large amount of time and effort to substantiate this theory, when as a matter of fact no such finding was made either by the Board of Review, by the Chairman of the Board of Review, by Mr. Hott, by the Secretary of Labor or his Assistant. The finding and decision of the Board of Review, or its Chairman was as follows: "The Board is satisfied that the best evidence favors the recognition of the validity of the marriage between Hung Shee and Leong. It further believes that the real Ho Shee is not identical with the applicant." Not a word in the whole decision about the practice of polygamy or a belief in polygamy. The only person who has, thus far, expressed any such finding is Martha Meier, the dissenting member of the Board of Special Inquiry, who appealed on that point and on the further point that the applicant



had made false and misleading statements to the Board. The Board of Review paid no attention whatever to Miss Meier's views on these questions and did not mention either of those points in its findings. How then can it be said that there was evidence to support the Secretary's findings on this question of polygamy when he made no such finding.

But we have here a still more peculiar situation. Appellant's counsel cover six pages of their brief with argument and citation of authorities for the purpose of persuading the Court that the applicant is not the Ho Shee who lived with Ah Leong in Honolulu from 1891 to 1910 and then, with a right about face, solemnly argue to the Court through seven pages of their brief that she practiced and believes in polygamy basing their argument upon the very facts denied in the argument on the question of identity. On page 53 of their brief they say: "The evidence clearly showed that her husband, whether he would be considered as legally her husband, or as her bigamous husband, was himself a bigamist and practiced polygamy during the entire time he lived with her. She not merely acquiesced in such relationship upon his part, but she indicated her approval by living in the same

house in Honolulu for many years with one of his wives (Record pages 310, 320), recognized by all the children as the prior wife, and in the same house in China with another of his wives (Record pages 304, 305, 224), in each instance there being children by the other wife.” It is as clear as anything can be that in order to make out any kind of a case against the applicant on this matter of polygamy they are forced to and, as shown by the above quoted excerpt from their brief, do admit the identity of the applicant.

Since the question of the applicant’s practice of or belief in polygamy is not before this Court we will waste no time in discussing it on its merits, but will conclude this portion of our brief by saying that it would be an unfortunate situation indeed if every legally married woman who suffered indignities and marital infidelity in silence should be subjected to a charge of practicing or believing in polygamy.

## VIII.

### THE BURDEN OF PROOF.

Counsel for appellant contend that the burden of proving her right to enter the Country is on the applicant (brief page 56) and then go on to say that “this principle of law was ignored by

the trial judge who indicated throughout his brief that the burden of proof rested upon the government" (Brief page 57). A careful examination of the trial Judge's decision and particularly of pages 106, 110 and 111 referred to in the brief, shows conclusively that the trial judge did no such thing. Referring to the question of the validity of the applicant's marriage to Ah Leong the trial Judge in his opinion (Record page 106) said that "the petitioner by proof of her marriage with Ah Leong in 1891, in full compliance with the laws of Hawaii *made out a prima facie case*, and then goes on to inquire whether this prima facie case was overcome by proof of a prior common law marriage, and held that the prima facie showing by the applicant had not been overcome by the respondent. This is very far from an expression of belief on the part of the trial Judge that the burden was on the government.

Referring to the question of identity the trial Judge said, "Every witness who testified before the Board of Special Inquiry identified the petitioner as being the original Ah Keau and there is not one scintilla of evidence on which to base a contrary finding (Record page 109), and again he says, "with her (Ho Shee's) testimony rejected there remains ample evidence to identify

her as the original Ah Keau and there is none to the contrary whether her testimony is believed or not" (Record page 109). We agree with counsel for the appellant that the burden of proof is on the applicant in the first instance, but contend that when ample evidence has been introduced to prove a fact and none introduced to the contrary we have amply sustained that burden.

After all the whole question of burden of proof simmers down to the ultimate inquiry "Are the findings of the Secretary of Labor adequately sustained by the evidence?"

## IX.

### UNIFORMITY OF ADMINISTRATION OF IMMIGRATION LAWS.

Counsel for appellant close their brief with an appeal for uniformity in the administration of the Federal Immigration Laws. They say that *where a distinctly Federal question* is involved the Federal Courts administer the National Law regardless of state laws and decisions. The Federal question involved in this case is the ultimate question as to whether or not the applicant is entitled to admission, but the preliminary question is as to whether the applicant is



the legal wife of L. Ah Leong, which latter question is purely one of local law. The marriage having taken place in Hawaii its validity must be tested by the laws of Hawaii and none other. The preliminary question, that is, of the validity, is not a Federal question at all.

In *Travers vs. Reinhardt, supra*, the Supreme Court did not decide the validity of the marriage in that case upon any theory of uniformity, or any theory of Federal Law. Travers' journeyings from state to state were followed by the Supreme Court of the United States until he finally located himself in a state which enabled the Supreme Court of the United States, *following the law of the state*, to say that the marriage was valid as a common law marriage, and Travers had to move from two states before the Supreme Court could say that. Counsel say (Brief page 78) that "where a husband happened to be at a port where common law marriages were not recognized he could abandon his common law wife and a large family, etc., etc." Of course this statement is not to be taken seriously. No one contends that the law of the present domicile governs the legality of a marriage.

Uniformity can be achieved only by adopting the rule above enunciated, namely, that the valid-



ity of the marriage is governed by the *lex loci contractus*.

## X.

### MATTERS EXTRANEIOUS TO THE ISSUES.

There has been a consistent effort throughout this case on the part of counsel privately interested and to some extent aided by counsel for the appellant to cloud the issue and to prejudice the rights of the applicant by references to Ah Leong's conduct and by charges of a conspiracy to defraud Hung Shee of her property rights. It is said in Exhibit "A" (Record page 58) by Mr. Carl Robe White that "it is apparent there are some steps on foot to defeat the interests of the alleged legal wife, Hung Shee." It is said in the brief in opposition to the admission of the applicant (Record page 278) "During the past year L. Ah Leong, apparently in an effort to deprive his wife, Hung Shee, of her interest in their joint property, aggregating about \$750,000.00 made an effort to form a corporation and turn all of their property over to said corporation." A very sad picture is drawn on page 78 of Appellant's brief wherein the common law wife

is left helpless and penniless, with a large family, on some inhospitable shore.

In the first place there is no warrant in the evidence for the statement that Ah Leong and Hung Shee owned this property jointly. All the conveyances set forth in the record purport to show that she had a dower interest only in the property. In the second place the very evidence that they rely on as showing an attempt to create a corporation (Record page 441) shows that the capital stock of this \$750,000.00 corporation was to be divided into 6,000 shares of which Hung Shee (Fung Dai Kim) was to get 2,000 shares, a mere matter of a quarter of a million dollars. Ah Leong was to retain for himself only 2,060 shares and 1,940 shares were to be divided between the children of Ho Shee and Hung Shee.

We are not to be understood as attempting in any way to palliate the offences committed by Ah Leong against the laws of Hawaii and of the United States in his relations with these several women, but, for the purpose of prejudicing the case of the applicant, to picture him as conspiring with the applicant to defeat the property rights of Hung Shee is, upon the face of the record, so grossly unfair as to make necessary these comments on the situation. It must be re-

membered that, at the time when Ah Leong and Ho Shee contracted this marriage, the only declaration found in the Hawaiian reports was against the validity of a common law marriage (*Estate of Gordon* 6 Haw. 289) and that from 1891 to the decision in *Godfrey vs. Rowland*, common law marriages were not considered valid marriages in Hawaii. The fact that he continued his illicit relations with Hung Shee after his marriage to Ho Shee should not be allowed to prejudice the claims of his lawful wife.

## CONCLUSION

In conclusion it is respectfully urged, FIRST, that the question of the identity of the applicant and of the validity of her marriage with Ah Leong were not before the Secretary of Labor for review on the appeal in this case and that therefore the decision of the Board of Special Inquiry upon those questions must stand; SECOND, that if the Secretary of Labor acquired jurisdiction to hear said appeal, the hearing was unfair in that it was heard upon evidence not before the Board of Special Inquiry, without notice or opportunity to the appellant to present her case and that it was heard upon matters not embraced within the appeal of the dissenting member;

THIRD, that the evidence shows conclusively the identity of the applicant with no contrary testimony; FOURTH, that the evidence shows nothing more than a common law marriage between Ah Leong and Hung Shee; FIFTH, that the evidence shows conclusively a valid marriage between Ah Leong and the applicant; and, SIXTH, that the Secretary of Labor did not sustain the appeal of the dissenting member.

It is therefore respectfully submitted that the judgment of the District Court was correct and should be sustained.

Respectfully submitted,

HARRY IRWIN,  
*Attorney for Appellee.*

Due service and receipt of a copy of the within is hereby admitted this.....day of....., 1923.

---

*Attorney for Appellant.* B. O.  
S. H.













